I Have peruſed this *Treatiſe*, Intituled the twelfth part of the *REPORTS* of Sir *Edward Coke* Knight; and I do, upon my reading thereof, conceive the ſame to be his *Collections*, and that the Printing of the ſame (containing very much good, and uſefull learning) will be for the good of this Nation, and of the Profeſſors of the *COMMON LAW*.

The ſecond of *February* 1655.

Edward Bulſtrod.

The Twelfth part of the

REPORTS

OF SIR

EDWARD COKE, Kt.

OF

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Paſch. 4. *Jacobi Regis.*

Ford *and* Sheldon's *Caſe.*

IN an Information in the Exchequer Chamber for the King, againſt Thomas Ford Eſquire, Ralph Sheldon Eſquire, and divers others; The Caſe was thus.

Thomas Ford was before the Statute of 23. Eliz. a Recuſant, and for money lent to Sheldon, ſome before 23. Eliz. and ſome after, tooke a Recognizance in the names of ſome of the other Defendants, and tooke alſo a Grant of a Rent-charge to them in Fee, with condition of Redemption by Deed indented: And the Recognizance was conditioned for performance of Covenants in the ſaid Indenture, and afterward the Statute of the 29 Eliz. was made, by which it was enacted, that if default of payment was made in any part of payment (viz.) of 20l. for every month, &c. That then and ſo often the Queens Majeſty by proceſs out of the Exchequer may take, ſeiſe, and enjoy all the goods, and two parts, &c. And after the ſaid Act, and before the 29 year of the Raign of the late Queen, Ford lent divers other great ſumms of money to Sheldon, & for aſſurance of it, took a Rent-charge by Deed indented, with condition of Redemption: And tooke alſo ſeverall Recogniſances in the names of ſome of the other Defendants, for performance of Covenants, &c. as is aforeſaid: which Recogniſances did amount in all to the ſumme of 21000l. all which were to the uſe of the ſaid Ford, and to be at his diſpoſition, and they were forfeited: And afterward, viz. 41 Eliz. Ford was convict of Recuſancy, and did not pay 20l. per menſem, according to the Statute. And, If upon all this caſe the King ſhould have the benefit of theſe Recognizances, was the Queſtion.

And this caſe was debated by Counſell learned on both ſides in Court. And it was objected by the Counſell of Ford, that if the Recognizances had been acknowledged to Ford himſelfe, they ſhould not be forfeited to the King, for the Statute ſpeaks only of Goods. And Debts are not included within the Word (Goods). And therefore, if the King grant all the Goods which came to him by the Attainder of I. S. the Patentee ſhall not have debts due to him, for that the Grant onely extends to Goods in poſſeſſion and not to things in action. And this act is a penall Law, and ſhall not be extended by Equity.

2. It was objected that theſe Recognizances were acknowledged, to performe Covenants in an Indenture concerning a Rent-charge: And therefore favors of the Realty, and are not within the intention of the ſaid act, which ſpeaks only of Goods.

3. No fraud or Covin appears in the caſe; And then foraſmuch as no Act of Parliament extends to this caſe, it was ſaid, that the Common Law doth not give any benefit to the King: For at the Common Law, in far ſtronger Caſe, if Ceſtuy que uſe had been attaint of Treaſon; this uſe foraſmuch

as it was but a truſt and confidence, of which the Law did not take notice, it was not forfeited to the King, and could not bee granted: and if an Uſe ſhall not be forfeited, of which there ſhall be a Poſſeſſio fratris, &c. and which ſhall deſcend to the Heir, A multo fortiori, a meere truſt and confidence ſhall not be forfeited.

4. It was objected, that if the forfeiture in the caſe at the Bar accrues to the King, by the Statute of 29. Eliz. it ought to be by force of this word (Goods): But that ſhall not be without queſtion in this caſe. For Ford hath not any Goods, but onely a mær truſt and confidence, which is nothing in conſideration of Law.

And the Court cannot adjudge that theſe Recognizances belong to the King by equity of the ſaid Statute, becauſe it is penall: Alſo one Recognizance was taken in the names of ſome of the other Defendants, before the Statute of the 29. Eliz. which gave the Forfeiture.

And for that reaſon, it cannot be imagined that it was to defeat the King of a Forfeiture, which then was not in Eſſe, but given afterwards.

As to the firſt objection, it was anſwered and reſolved by all the Barons, and by Popham chief Juſtice of England, and divers others of the Juſtices, with whom they conferred, that if the Recognizances had beene acknowledged to the party himſelfe, that they were given to the King without queſtion for perſonall Actions, are as well included within this word, Goods, in an Act of Parliament, as Goods in poſſeſsion. But inaſmuch as by the Law things in action cannot be granted over for that cauſe by generall grant (things in action (which onely he may grant by his Prerogative) without ſpeciall words paſſe not for what he can grant only by his Prerogative) can never paſſe by generall words. And it was affirmed, that ſo it had been reſolved before, that is to ſay, That Debts were forfeited to the King by the ſaid Act of the 29. Eliz. And where the Statute ſaith, Shall take, ſeiſe, and enjoy all the Goods, and two parts, &c. Although a Debt due to a Recuſant cannot be taken and ſeiſed, yet inaſmuch as there is another word, viz. Enjoy, the King may well enjoy the Debt; And by proceſſe out of the Exchequer levy it, and ſo take and ſeiſe, refers to two parts of lands in poſſeſſion, and enjoy relates to Goods.

As to the ſecond Objection, it was originally for the loan and forbearance of mony. And aſwell the Recognizance as the Annuity were made for the ſecurity of the payment of the ſaid money: Alſo when the Recognizances are forfeited, they are but Chattels perſonall.

As to the third Objection, there was Cobin apparent: for when he was a Recuſant continually after that Statute of the 23. Eliz. & for that chargeable to the King, for the forfeiture given by the ſame Act, it ſhall be intended that he tooke theſe Recognizances in the name of others, with an intent to prevent the King of levying of the forfeiture: And all the Recognizances which were taken in other mens names after the ſaid Act, ſhall be preſumed in Law to be ſo taken, to the intent to defeate the King of his Forfeiture: True it is, that an Uſe or Truſt ſhall not be forfeited for Treaſon or other offence by the Common Law, becauſe it is not a thing of which the Common Law taketh any notice, for that Ceſtuy que uſe, hath neither Jus in re, nor Jus ad rem; but by the Common Law, when any act is done with an intent and purpoſe to defraud the King of his lawfull duty, or Forfeiture by the common Law, or Act of Parliament, the King ſhall not be barred of his lawfull Duty and Forfeiture, Per obliquum, which belongs to him by the Law, if the Act was made De directo.

And therefore if a man Out-lawed buy Goods in the names of others, the King ſhall have the Goods in the ſame manner, as if he had taken them directly in his own name: So if any Accountant to the King purchaſe Lands in the names of others, the King ſhall ſeiſe thoſe lands for mony due unto him.

And

And this appeares by the caſe of Walter Chirton. Trin. 24. Ed. 3. Rot. 4. in Scaccario, where the caſe was, that Walter de Chirton was indebted to the King, 1800 l. which he had received of the Kings Treaſure, and did purchaſe certaine Lands with the Kings money; and by Covin had cauſed the Tendor to enfeoff his Friends in Fee to defraud the King, and notwithſtanding tooke the Profits himſelfe: And afterwards Walter Chirton was committed to the Fleet for the ſaid Debt. And all the matter was found by Inquiſition, and by Judgement the Land was ſeiſed into the Kings hands Quouſque; for in caſe of the King, an act done by Covin, Per obliquum, ſhall bee equall to an act done De directo, to the party himſelfe, For, Rex fallere non vult, falli autem non poteſt: See another Preſident, Trin. 24. Ed. 3. Rot. 11. Suis Regis, where one Thomas Favell was Collector of Tithes and Fiftéenes, and was ſeiſed of certaine Lands in Fee-ſimple, and having divers Goods and Chattels, Die intromiſſionis de collectione & levatione, Of Tenths and Fiftéenes, Languidus in extremis alienavit tenementa ſua & bona & catalla diverſis perſonis, And died without Heir or Executor. In this caſe by the Prerogative of the King, Prores was made as well againſt the Tertenants, as againſt the Poſſeſſors of the Goods and Chattels, although they were not Executors, &c. Ad computandum pro collectione predicta, & ad reſpondendum & ſatisfaciendum inde Regi, &c. Et hoc per Cancellarium Anglice & Capitales Juſticiarios Anglice, & aliorum Juſticiariorum utriuſque Banci; quod nota bene.

As to the fourth Objection, Non refert, whether the duty do accrue to the King by the Common Law, or by Statute; but be it the one way or the other no Subterfuge that the party can uſe, can defeat or defraud the King: And although one of the Recogniſances was taken before the Statute of 29. Eliz. yet that was to his uſe, and for that it is in the nature of a Chattell in him, and was taken in the names of others to prevent the Queen of her Forfeiture, which ſhe might have by the Act of 23. Eliz. And although Ford was not convict untill 41. Eliz. that is not materiall, for at all times before that he was ſubject to a Forfeiture for his Recuſancy.

Paſch. 4. Jac.

In the Chancery, 27. *Junii*, 29 *Eliz. Inter Johanem Dominum S. John de Bletro querentem, & Decanum & Capitalem Gloceſtria Defendentes.*

Appropriation; Procedendo denied in Chancery.

The caſe was, that the Plaintiff brought a Quare impedit in the Common Pleas, againſt the Defendant, for the Church of Penmark, in the County of Glamorgan; which Suit was ſtaid by Ayde-prayer, and the Record was removed into the Chancery; upon which the Plaintiff moved for a Procedendo, and upon Oyer of Cauſe, before Sir Thomas Bromley Lord Chancellor, in the preſence of Sir Gilbert Gerrard Maſter of the Roules, and Shute and Wyndham Juſtices, and Popham Attorney, and Egerton Solicitor of the Queen, the Plaintiff ſhewed a Gift in Tail of the ſaid Advowſon made to his Anteceſſor, in the 18. R. 2. and a Verdict for his Anteceſſor in the 12. H. 8. and a Preſentation by his Grandfather to the ſaid Church, of a Clerk who was admitted, inſtituted, and inducted, with poſſeſſion for certaine yeares, and divers other matters to prove the Title of the Plaintiff, yet for this, that the Defendant and thoſe from whom he claims, time out of mind, had had the poſſeſſion of the Parſonage as Impropriate (ſaving interruption for ſome ſmall time.) And for this that it ſhal be a dangerous preſident to the Queen and others, Owners of Impropriations, being able to maintain

tain the Appropriations to be perfect in all poynts and circumstances, which are requisite to the making of an absolute and compleat Impropriation, the Appropriations being made of ancient time.

It was resolved by this Court of Chancery, by the advice of the Justices and Counsell learned of the Queen, that no Procedendo in loquela should be granted.

Vide Ridley fol. 153, 154. the beginning of Appropriations and of Annuities to be discharged of Tithes; It was after *Benedict* who was the Institutor of Monks, *&c.* And note there the reason of Prayer being preferred before Preaching.

Vide. 155. *ibid.* That the Saxon Kings appropriated eight Churches to the Monastery of *Croyland*, as appears by *Ingulphus* who was Abbot there.

Trin. 30. *Eliz.* In the Exchequer Chamber.

Inter Thomas Crimes *et alios Querentes*, *et* Henricum Smyth *Defendentem.*

Endowment is presumed when a Vicaridge hath long continued.

THe Case was such; The Abbot of Sulby held the personage of Bulbenham in the County of Leicester appropriate, which as a Parsonage Impropriate came to King H. 8. by dissolution of Monasteries, Anno. 31. H. 8. who in the 37 year of his Raign, granted it in Fee-farme; under which Grant the Plaintiff claimeth, the Defendant had obtained a presentation of the Queen, and to destroy the said Impropriation did shew the Originall Instrument of it, Anno. 22. Edw. 4. with condition, that a Vicaridge should be competently endowed, and alledged that the said Vicaridge was never endowed. And for that very cause the Impropriation was void, and in truth there was no Instrument, nor direct proof of any endowment of the Vicaridge.

But for this that the said Rectory was during all the time of the Impropriation supposed, reputed, & taken to be Appropriate, and by all that time a Vicar presented, admitted, instituted, and inducted as a Vicar rightfully endowed, and paid his First-fruits, and Tenths:

It was resolved by all the Court, that it shall be presumed that the Vicaridge in respect of continuance was lawfully endowed, for that Omnia presumuntur sollemniter esse acta. And it shall be of dangerous president to examine the Originals of Impropriations of any Parsonages, and the endowments of Vicaridges, for that the Originals of them in time will perish. And so it was decreed for the Plaintiff.

Hill. 4. Jac. Regis.

Inter William Bedle *gen. quer.* & Thomam Beard *Clericum* Jacobum Wingfeild *militem* & Mariam Wingfeild *Defend.*

Chancery. *Impropriation* not void because of an Estate-tail in the Patron, Grantor, &c.

THe Case was thus. Anno. 31. Edw. 1. The King being seised of the Mannor of Kimbolton, to which the Advowsen of the Church of Kimbolton was appendent, by his Letters Patents granted the said Mannor, with the Appurtenances, to Humphrey de Bohune Earl of Hereford, in Taile generale. Humphrey de Bohune the Issue in Tail, by his Deed, in the 40. of Ed. 3. granted the

the Advowſon then full of an Incumbent to the Prior of Stoneley, and his Succeſſours: And at the next avoidance they held it, In proprios uſus; And upon this Appropriation made, Concurrentibus ijs quæ in jure requiruntur, after the death of the Incumbent, the ſaid Prior and his Succeſſors held the ſaid Church appropriate, untill the diſſolution of the Monaſtery, in the 27 H. 8. the ſaid Manner deſcended to Edward, Duke of Buckingham, as Iſſue to the ſaid Eſtate-tail. And the Reverſion deſcended to King H. 8. The Duke in the 13 H. 8. was attaint of high Treaſon, 14 H. 8. The King Granted the ſaid Manner, &c. with all Advowſons appendent, &c. to Richard Wingfield, and the Heirs Males of his body, 16 H. 8. It was enacted by Parliament, that the ſaid Duke ſhall forfeit all Manners, &c. Advowſons, &c. which he had, &c. in 4 H. 8. The King, Anno 37. H. 8. Granted and ſold for Money the ſaid Rectory of Kimbolton, as impropriate in Fee, which by mean conveyance came to the Plaintiff for 1200 l. Anno 37. Eliz. Beard the Defendant did obtain a Preſentation of the Quæn by Lapſe, pretending that the ſaid Church was not lawfully impropriate to the ſaid Prior of Stoneley.

1. For this, that Humphrey who did grant it to the Prior, had nothing in it, for that it did not paſs to his Anceſtor by theſe words (Mannerium cum pertinentibus.)

2. For for that, that he had no more then an Eſtate in tail, and then by his death his grant was void.

But it was reſolved by the Lord Elleſmore, Lord Chancellor, with the principall Judges, and upon conſideration of Preſidents, that the Plaintiff ſhall enjoy the ſaid Rectory. For although that by any thing which can now be ſhewn, the impropriation is defective (for by nothing which now appeares, the iſſue in tail had any thing in the Advowſon at the time of his Grant to the ſaid Prior, for that the Advowſon did not paſſe by the Grant of the King, by theſe words (Cum pertinentibus) yet it ſhall be now intended in reſpect of the ancient and continual poſſeſſion, that there was a lawfull Grant of the King to the ſaid Humphrey, who granted in Fee, ſo that he might lawfully grant it to the ſaid Prior, (Omnia preſumitur ſollemniter eſſe acta) And all ſhall be preſumed to be done, which might make the ancient Impropriation good: For Tempus eſt edax rerum; And Records and Letters Patents, and other Writings, either conſume or are loſt, or imbeſiled: And God forbid, that the ancient Grants and Acts ſhould be drawn in Queſtion, although that they cannot be ſhewn, which at firſt was neceſſary to the perfection of the thing: And if the Impropriation had been drawn in Queſtion, in the life-time of any of the parties to it, they might have ſhewn the truth of the matter: But after the death of all the parties, and after ſo many ſucceſſion of ages. In all which the ſaid Church was eſteemed and allowed, to be rightfully impropriate.

If any objection or exception ſhould now prevail, the ancient and long poſſeſſion of the Owners of the ſaid Rectory ſhould hurt them. For if theſe objections or exceptions, had been made in the lives of the parties, without any Queſtion they had been anſwered, or otherwiſe in ſo many ſucceſſions of ages, it would have been impeached or impugned.

Mich. 4. Jac Regis.

Forfeiture. Treason.

Hil. 43. Eliz. A Case was moved to all the Justices, Tenant in Taile before the Statute of 27. H. 8. made a Feoffment in Fee, to the use of himself and his Wife in tail: And after the Statute of 27 H. 8. is made, the Husband was attaint of high Treason, 31. H. 8. and dyed, the Wife continued in possession and dyed, their Issue enter, and dye, and this descends to his Issue: And all this especiall matter is found by an Office.

The Question was, If the Issue in tail, or the King, shall have the land; And it was objected that the right of the ancient Estate-tail cannot be forfeited for divers causes; Viz.

1. For this, that the ancient Estate was discontinued, and such right of action cannot be forfeited; As it is agreed in the Marquesse of Winchesters case.

2. The Feoffer himself, as this case is, had not any right to the ancient Estate-taile (for by his Feoffment his right was utterly gone) was attaint, and he cannot forfeit what he hath not.

3. The Issue in tail is remitted to that ancient right which cannot be forfeited: And the new Estate-taile which was derived under the discontinuance, and which may be forfeited by the Statute of the 26 H. 8. cap. 13. is continued; and by Act in Law, Viz. The discent and remitter avoided: And the Estate of the King may be divested out of the King by remitter, which is an Act in Law. As if discontinuee of Tenant in taile, grant the Land to the King, his Heires and Successors: And the King grant the Land to Tenant in taile for life, the remainder to his Sonne and Heire apparent for life, Tenant for life dyes, the Issue by Act in Law is remitted: And by this all the Estate of the King which he hath under the discontinuance, is divested out of him, and with this accords Plow-Com. 489. in Nicols Case: so in the case at the Bar, the new Estate under the discontinuance which was forfeitable is now purged by the Remitter of that ancient right; and the Title which the King hath, by that defeated and avoided.

Resolved that in this case the Issue in tail was barred: And that which had been said, answered, confessed, and averred. For truth it is, that right of Action cannot be given to the King, by the Statute of the 26 H. 8. But when Tenant in tail discontinues his Estate to the use of himself in taile, and after is attaint of Treason, now by the Statute of 26 H. 8. he doth not forfeit only the new Estate in tail, but by this the right of the ancient Estate is barred for ever: For the words of the Statute are, That every Offendor being lawfully convict of high Treason, &c. shall forfeite to the King, his Heirs and Successors, all such Lands, Tenements, and Hereditaments, which any such offendor shall have of Estate of Inheritance: By which words, if there was not any saving, the right of the ancient Estate-tail was bound, then the saving is, saving to every person, &c. other then the Offendors, their Heirs, and Successors, and such persons as claim to any of their uses, all such rights, so that the offendor and his Heirs are excluded out of the saving: For Heirs includes all manner of Heirs, and for this they are bound by the body of the Act.

Also note a diversity between a naked right of Action which is not forfeitable, and an Estate of Inheritance which is forfeitable, coupled with an ancient right for which the forfeiture of the Possession is barred by

by the ſaid Act. And when all this appears by Office, then is the Iſſue in tail notwithſtanding the Remitter barred by force of the ſaid Act of Parliament, to which all are parties or privies: And it is not like to the Caſe in Plowden's Com. of Remitter, for this is no War of an ancient Right.

Paſch. 4. Jac. Regis.

AT this Parliament held, Paſch. 4. Jac. Regis, It was moved and ſtrongly urged at a Grand Committee of Lords and Commons in the Painted Chamber, that ſuch Biſhops as were made and created after the firſt day of this Seſſion of Parliament were not lawfull Biſhops.

1. Admitting that they were Biſhops, yet the manner and forms concerning their Seals, Stiles, Proceſſe, and Proceedings in their Eccleſiaſticall Courts were not conſonant to Law: And their reaſon was for this, that it is provided by the Statute of 1 Edw. 6. cap. 2. that from thence forward Biſhops ſhould not be Elective, but Donative by the Letters Patents of the King: And that forasmuch as at this day all Biſhops are made by Election, and not by Donation of the King, according to the Act; for this Reaſon, if the ſaid Act of 1 Edw. 6. be not in force from the time that it took its effect, the Biſhops are not lawfull.

2. By the ſaid Act of 1 Edw. 6. it is further enacted, that all Summons, Citations, and Proceſſe in Eccleſiaſticall Courts, ſhall be made in the name and ſtyle of the King, and that their Seals ſhall be engraven with the Kings Armes, and that Certificates ſhall be made in the name of the King. And whereas the ſaid Act of 1 Edw. 6. was repealed by a ſpeciall Act, 1 Mariæ Parliam. 1. cap. 2. Seſſ. 2. And the ſaid Act 1 Mar. is now repealed by a branch of an Act, 1 Jac. cap. 25. verſus finem, for by the ſame Act it is enacted, that the ſaid Act of 1 Mar. ſhall be expreſly repealed: The ſaid Act of 1 Edw. 6. is now in force.

For when an act of Repeal is repealed, the firſt act repealed is revived, &c. as appears in Spencers Caſe, 15 Edw. 3. Title Petition 2.

And for this, it was concluded that the ſaid 1 Edw. 6. cap. 2. being in force, by a conſequence all Biſhops made after the act 1 Jac. were not lawfull Biſhops: and for that their ſtyle and proceedings after the ſame act in the Name of the Biſhop, and not in the name and under the Seal of the King; for this cauſe the Proceedings were unlawfull, *Quia non obſervata forma, infertur adnullatio actûs.* And theſe were matters of great import and conſequence.

As to theſe Objections, upon conſideration had of them by commandment of the King, it was anſwered and reſolved by Popham chiefe Juſtice of England, and Coke Attorney of the King, and afterwards affirmed by the chief Baron, and the other Juſtices then attendant to the Parliament, upon good advice and conſideration, that although the ſaid act 1 Mar. be repealed, that yet the ſaid act 1 Edw. 6. cap. 2. for other cauſes is not now in force, but remains repealed: yet true it is, that when an act of Repeal is repealed, the firſt act as hath been ſaid ſtands in force, and is implicitè revived. But it is to be obſerved, that the ſaid act, 1 Edw. 6. was repealed, annulled, and annihilated by three ſeverall acts of Parliament: And as a man which is bound by three ſeverall Bonds, although he breake one or two of them, yet the third which remaines whole will bind him: ſo when the

the words of three ſeverall acts repeal or adnull an act, although that one or two of the Acts of Repeal or adnullation are repealed, yet the other which remains in force, adnuls the firſt act: Firſt of all, the act of 1 Mar. expreſſly repealed the act of 1 Edward. 6. 2. & the act of 1. & 2. Phil. & Mar. hath likewiſe ſufficient words to repeal and adnull the ſaid act of 1 Edward. 6. as to Style, Seal, and Proceſs, in Court Chriſtian, although that the act of 1 Mar. Parlia. 1. had never been made, the words of which act are, and the Eccleſiaſticall Juriſdictions of the arch-Biſhops, Biſhops, and Ordinaries to be in the ſame eſtate for proceſs of Suits, puniſhment of Crimes, and Execution of Cenſures of the Church, with knowledge of cauſes belonging to the ſame, and as large in theſe poynts as the ſaid Juriſdiction was, Anno. 20. H 8. And although that the ſaid act of 1 Mar. hath by expreſs words repealed the ſaid act of 1 Edward. 6. and for that it may be ſaid, that the ſaid act of 1, and 2 Phil. & Mar. could not repeal that which was repealed before; yet it was reſolved that now, in as much as the repeal which the act of 1 Mar. operates is now adnulled and repealed, it follows, that if now the act of 1. & 2 Phillip and Mary be in force, or if the ſaid act of the 1 Eliz. cap. 1. operate only as to the ſaid act of the 1. & 2. Phil. and Mar. it makes that the ſaid act of 1 Ed. 6. cannot alſo ſtand, *Quia* leges poſteriores priores contrarias abrogant. But it was objected that the ſaid act of the firſt and ſecond of Ph. and Ma. is repealed by the Statute of 1 Eliz. 1. And it was anſwered and reſolved that it is enacted by the act of the 1 Eliz. that the ſaid act of 1. and 2 Phil. and Mar. and every branch and article of it (other then for ſuch branches as be hereafter expreſſed) ſhall be repealed: and after by the other branch of 1 Eliz. It is enacted, that all other Lawes, Statutes, and every branch thereof repealed and made voide by the ſaid act of 1. and 2. of Phil. and Mar. and not in this act eſpecially mentioned and revived, ſhall remaine and be repealed and voide, as the ſame were before the making of the act: But the act of 1 Edward. 6. was as hath been ſaid repealed by the act of 1 and 2 Phil. and Mar. and the act of 1 Edward. 6. is not revived ſpecially by the act 1 Eliz. yet the act of 1 Edward. 6. remaines repealed as it was before the ſecond act, which hath ſufficient words to repeal and adnull the act of 1 Ed. 6. and to anſwer both the objections; the Statute of 1 Eliz. cap. 1. revives the act of 25. H. 8. cap. 20. and further enacts, that it ſhall ſtand in full force and effect, to all intents conſtructions and purpoſes. And by the ſaid act of the ſaid 25. Hen. 8. Cap. 20. It is provided that at every avoidance of any Arch-biſhop or Biſhop, the King, his Heires and Succeſſors may grant to the Prior and Covent, and the Deane and Chapter, &c. a license under the great Seal, as of old time hath been accuſtomed, to proceed to the Election of an Arch-biſhop, or Biſhop, with a Letter miſſive containing the name of the perſon which they ſhall elect and chooſe, &c. And further by another branch in the ſame act, It is enacted, that every perſon choſen elected, and inveſted, and conſecrated Arch-biſhop or Biſhop, according to the forme and effect of this act, ſhall doe and execute every the thing and things, as any Arch-biſhop or Biſhop of this Realme, without the offending of the Prerogative Royall of the Crowne, and the Lawes and Cuſtomes of the Realme might at any time heretofore do: And theſe two branches anſwers to both the Objections; viz. For the manner of Election and conſecration of Arch-biſhops and Biſhops, and alſo for the making and execution of all things which belongs to their authority, as any Arch-biſhop or Biſhop might have done before the making of the ſaid act of 25. H. 8. within which words the Stile and Seal of their Court, and the manner of their proceedings are incloſed. And now the act of 1 Eliz. cap. 1. having revived the act of 25. H. 8. and enacted that the ſame ſhall ſtand and be in full force and

ſtrength,

ſtrength, to all intents, conſtructions, and purpoſes; from hence it follo-wes, that the act of 1 Eliz. reviving the 25 H. 8. hath repealed the act of 1 Ed. 6. for in an act which was repealed, the Repeal is void and annulled: And this was the principall cauſe of the ſaid reſolution, for both the points upon which the ſaid doubts were conceived. And it is to be obſerved, that the intention of the ſaid Repeal by the act of 1 Jac. was to repeal the ſaid act of 1 Mar —— As to an act made 5 Ed. 6. by which it is enacted that the Patrimony of all and every Prieſt, and other Eccleſiaſticall and Spiritnall perſons ſhall be adjudged, deemed, and taken, for juſt, true, and lawfull Patrimony, to all intents, conſtructions and purpoſes: And that all Children born in ſuch Patrimony ſhall be deemed and adjudged, to all intents, conſtructions, and purpoſes, to be born in lawfull Patrimony, and be legitimate and inheritable, to Lands, Tenements, and Hereditaments; and that they ſhall be Tenant by the Courteſie, and Tenant in Dower, &c. ſo that now the ſaid act of 1 Mar. being repealed, the ſaid act of 5 Ed. 6. cap. 10. is now in force, and the Patrimony of all Eccleſiaſticall perſons and their Iſſue, lawfull and legitimate, to all intents, conſtructions, and purpoſes, by which the doubt amongſt the vulgar is well explained.

But the Repeal of all the act of 1 Mar. by which divers other Statutes were repealed, being repealed generally without any reference as to the ſaid act of 5 Ed. 6. according to the intention of the Parliament Sub ſilentio, made the ſaid ſcruple. And yet as it appears by this reſolution upon manifeſt and direct matter, no inconvenience of the generall Repeal of the ſaid act 1 Mar. doth inſue.

And note, by our Books it appears, that if a Deacon or Prieſt take a Wife, the marriage was voidable by divorce, and not void, for they had not vowed Chaſtity: And for that, if they had Iſſue, and one of them dyes, the Iſſue ſhould be inheritable. But if a Munk, or Nun, or other Religious perſon which had made a Vow of Chaſtity, had married, this marriage is void: And this doth appear 5 Ed. 2. Title Non-ability, 26. 19. H. 7. Title Baſtardy 33. 21. H. 7. 39. b.

Mich. 4. Jac.

IT was reſolved in the Star-Chamber in the ſame Term, that the King had not the pre-Emption of Tinn in Cornwall by any Prerogative. For Stanni fodina nec plumbi fodina, &c. or other ſuch baſe Mynes, do not belong to the King by his Prerogative, but to the Subject which is Owner of the Land: But the pre-Emption of Tinn in Cornwall, belongs to the King as an ancient Right and Inheritance due to the King, as well of Tinn in the Land of the Subject as in his proper Demeſnes: And although that now a reaſon cannot eaſily be rendred of things done before time of memory, yet it may well be, that all the Land of the County was the Demeſne of the King; And upon Grant of the Land the King reſerved the Mines to himſelfe, for theſe Mines of Tinn are of great antiquity, as appears after, Ex Diodoro Siculo. Et certo certius eſt, that all the land in England is derived mediatly or immediatly from the Crown, for all Land is held mediatly, or immediatly of the King, and for this reaſon ſuch a Profit apprender may have a reaſonable commencement: And where uſage hath allowed it to the King, it doth belong to him. True it is, that all the County of Cornwall was within the Foreſt of the King: and that

Tin pre-emption in *Cornwall.*

it was diſauthoriſed by King John, as appears by Camden. And what conſideration the Country gave for it to the King concerning Tinn cannot now appear, but this appears plainly, that before the 33 Edw. 1. all the Tinn in Cornwall and Devon alſo, to whomſoever the Land belonged, appertained to the King: And this is proved by divers expreſſe Records, and by an ancient Charter of King John, amongſt the Records of the Biſhop of Exeter,

In Regiſtr. in hæc Verba. Johannes dei gratia Rex Angliæ, &c. Omnibus balivis ſalutem, Sciatis quod intuitu dei & pro ſalute animæ noſtræ, &c. dedimus conceſſimus ac preſenti charta noſtra confirmavimus Deo & Eccleſiæ beati Petri

Co. 4. Inſt 232. Exon & venerabili patri Simoni Exon Epiſcopo & ſucceſſoribus ſuis Exon epiſcopis, decimam de antiqua firma ſtanni in Com. Devon, & Cornubiæ: Habendum ſibi & ſucceſſoribus ſuis cum omnibus libertatibus & liberis conſuetudinibus ad eam pertinentibus, per manus illius vel illorum qui ſtannarium habuerint in cuſtodia, &c.

Paten. 1 H. 3. memb. 4. Rex, Roberto de Courtney ſalutem. Mandamus vobis quod ſine dilatione & difficultate aliqua, habere facietis Iſabellæ Reginæ matri noſtræ, ſtannaria com. Devon. cum Cuneo & omnibus pertinent.

Teſte Com. Mariſcallo, &c.

4 H. 3. Fines 5 H. 3. Rex conceſſit Johanni, filio Richardi, ſtannariam in Cornubia reddendo 1000. marks.

10 Hen. 3. memb. 9. Rex, &c. Sciatis quod Conceſſimus Richardo dilecto fratri noſtro, ſtannariam noſtram Cornubiæ, cum omnibus pertinentibus, With Prohibition that none tranſport any Tinn without licenſe of the ſaid Richard.

10 Ed. 2. Inqui. 2. numero 29. For this that Decima ſtannariæ noſtræ in Com. Cornubiæ & Devon. do belong to the Biſhop of Exeter; It was therefore commanded to the ſaid Sheriff to value the ſaid Stannary, ſo that the Biſhop may have that which to him doth belong, Viz. Vera decima Stannariæ; In which note Stannariæ noſtræ.

33 Ed. 1. grant all Tinners, vide Plow. com. 327. Note, there are two ſeverall Charters, both bearing date 10. Aprilis An. 33. Ed. 1. The one Ad emendationem Stannariarum noſtrarum in Com. Devon: And the other Ad emendationem Stannariarum noſtrarum in Com. Cornubiæ: Conceſſimus eiſdem Stannatoribus quod fodere poſſunt ſtannum & turbus ad ſtannum fundendum ubique in terris noſtris, et vaſtis noſtris, & aliorum quorumcunque in Comitatu predicto; Et aquas, & aquarum Curſus divertere Ubi & Quoties opus fuerit, &c. ad Fundaturam Stanni ſicut antiquitas Conſuevit, ſine impedimento noſtro ſeu aliorum quorumcunque: Ac quod omnes Stannatores noſtri prædicti totum ſtannum ſuum ponderatum, &c. licite vendere poſſunt Cuicunque voluerint, faciendo nobis & heredibus noſtris Cunageum & alias Conſuetudines debitas & uſitatas niſi nos vel heredes noſtri ſtannum illum emere voluerimus.

35 Ed. 1. in the Treaſury. The liberty granted to Tinners by the ſaid Charter, 33 Ed. 1. granted to all Tinners; which Charter of 33 Ed. 1. made to the Tinners of Devon. was confirmed De verbo in verbo, An. 4. Ed. 2. and was alſo confirmed, An. 1. & 17 Ed. 3.

Rot. Almaine, Annot 12. F. 3. part. 1. num. 17 De adviſamento Concilii noſtri ordinavimus quod ſtannum in Com. Cornubiæ & Devon ad opus noſtrum Capiatur pro defenſione regni noſtri, &c. Et ad partes marinas Celeriter mittatur, in auxilium & ſupportationem honorum

norum noſtrorum, &c. Ita quod hominibus quibus ſtannum illud Capi Contigerit, de pretio ejuſdem ſtanni ad certos terminos ſolvend. ſufficiens ſecuritas per nos fiat, Aſſignavimus vos conjunctim & diviſim ad capiendum, ad opus noſtrum, totum ſtannum in Comitatu predicto Cunitum & etiam Cuniend. cum cunitum fuerunt. And there is alſo authority given to take Carriages Tam per Naves & battellos in Portibus Com. predict. exiſtent. quam Carrecta & alia Carriagia quæcunque pro ſtanno illo uſque ad Portum Southampton Cariandum: And commandment given to the Sheriffs, Quod ipſi ſumptis pro Carriagiis & aliis neceſſariis in hac parte inveniendis de exitibus ballivarum ſuarum ſolvant.

Edward the black Prince deceaſed and the King (under the great Seal) confirmed (the ſame year) to Tydman of Limberge, Cunageum ſtannariæ totius Ducatus Cornubiæ pro tribus annis. Nec non emptionem totius ſtanni, tam infra dictum Ducatum Cornubiæ quam Com. Devon foſſi & fodendi quod vendi debeat pro fine mille marcarum, & reddendo tria mille & quingentas marcas. 21 Ed. 3. ex Rot. Patent.

The ſaid Charter was confirmed at the Suit of the Tinners, 8 Ric. 2. to the Tinners in Cornwall. 8 R. 2.

The ſaid Charter of 33 Ed. 1. to the Tinners of Devon, was confirmed at the Suit of the Tinners, Anno, 1 Ed. 4. 1 Ed. 4.

It was alſo at their Suit confirmed, 3 H. 7. to the Tinners of Devon. 3 H. 7.

Vide the Statute of the 11 of H. 7. by which it is ordained that a certain weight and meaſure ſhall be uſed throughout all England; Provided alwayes, that this act extend not, nor be in any wiſe hurtfull, or prejudicial to the Prince within the Dutchy of Cornwall, or any weights belonging to the Coynage of Tinn with the Counties of Cornwall and Devon, but that ſuch Weights ſhall be uſed, &c. as hath been accuſtomed. 11 H. cap. 4.

The King gave Commiſſion and power to Gilbert Brockhouſe, to have preemption for and in the name of the ſaid King of all white Tinn within Cornwall and Devon, for one and twenty years, yeilding three thouſand marks Rent. 26 April. 7. E. 6. le Roy moruſt in Im. enſuant, &c.

Note the ſtile of the ſaid Courts of Stannaries in Cornwall and Devon, at all times, and during all the Raign of Queen Elizabeth, Mar. Ed. 6. H. 6. H. 7. Ed. 4. H. 6. H. 5. H. 4, &c. Magna Curia Domini regis Ducatus ſui Cornubiæ apud Crokerenten in Com. Devon coram Johane Comite Bedford Cuſtode Stannariæ dicti Domini regis & Regine in dicto Comitatu Devon: By which it may appear, that at the firſt all the Tinn in the County of Cornwall and Devon belonged to the King: And after the ſaid Charters of 33 Ed. 1. the King may buy all if he will.

And note the antiquity of Tinn Mynes in Cornwall, Vide Camden in Cornwall, 121. extremam Promontoriam quod oræam Vergivio incumbit, Diodoro Siculo dicit Balerium: Et vide Diodoro Siculo lib. 5. c. 8. fol. 142. b. Brittani qui juxta balerium promontorium incolunt Mercatorum uſu qui eo ſtanni, &c. Camden in Corwall. f. 134 Diod. Siculus. floruit ſub Auguſto.

And as for that which was objected that the Charter of 33 E. 1. extends only to Tin within the Land of the King himſelf: It was reſolved that by the ſaid clauſe (Fodere & fundere ſtannum terris noſtris & vaſtis noſtris & aliorum

rum quorumcunque, &c. Sicut Antiquitas Conſuevit, &c. It is manifeſt that the King hath all the Tinn, as well in the Land of the Subject as in his own proper Land.

2. It ſhall be abſurd that the King ſhall reſerve the emption of his own Tin.

3. The King grants Stannatoribus noſtris, divers Liberties and Immunities which are all enjoyed as well by the Tinners in the Lands of the Subject, as by thoſe in the Lands of the King, &c.

In the Seſſion of Parliament held in *Decemb. An.* 4. *Jac. Regis.*

Prerogative of the King in Saltpeter.

ALL the Juſtices, Viz. Popham chief Juſtice of England, Coke chief Juſtice of the Common Pleas, Fleming chief Baron, Fenner, Searl, Yelverton, Williams, and Tanfield, Juſtices, were aſſembled at Serjeants Inn, to conſult what Prerogative the King had in digging and taking of Saltpeter to make Gun-powder by the Law of the Realm; And upon conference between them, theſe points were reſolved by them all, Una voce.

1 Poinr. That although the invention of Gun-powder was deviſed within time of memory, Viz. In the time of R. 2. yet in as much as this concerns the neceſſary defence of the Realm, he ſhall not be driven to buy it in forraign parts; and forraign Princes may reſtrain at their pleaſure, in their own Dominions: And ſo the Realm ſhall not have ſufficient for the defence of it, to the perill and hazard of it: And therefore inſomuch as Saltpeter is within the Realm, the King may take it according to the Limitations following, for the neceſſary defence of the Kingdom.

2 Point. Although the King cannot take the Trees of the Subject growing upon his Freehold and Inheritance, as it was now lately reſolved by us the Juſtices of England. And although he cannot take Gravell in the Inheritance of the Subject, for reparation of his houſes, as the Book is in 11 H. 4. 28. Yet it was reſolved that he may dig for Saltpeter, for this that the Miniſters of the King who dig for Saltpeter, are bound to leave the Inheritance of the Subject in ſo good plight as they found it, which they cannot do if they might cut the Timber growing, which would tend to the diſinheritance of the Subject, which the King by Prerogative cannot do; for the King (as it is ſaid in our Books) cannot do any wrong.

And as to the Caſe of Gravell, for reparation of the houſes of the King, it is not to be compared to this caſe: for the caſe of Saltpeter extends to the defence of the whole Realm, in which every Subject hath benefit, but ſo it is not in the caſe of the reparation of the Kings houſes: And for this it is agreed in the 13 H. 4. and other Books that the King may charge the Subject for Murage of a Town, to which the Subjects were charged in the time of inſurrection or War, for ſafety: And ſo for Portage, for this that he which is charged hath benefit by it, but the King cannot charge the Subject for the making of a Wall about his own houſe, or for to make a Bridge to come to his houſe; for that doth not extend to publike benefit: But when Enemies come againſt the Realm, to the Sea Coaſt, it is lawfull to come upon my Land adjoyning to the ſame Coaſt, to make Trenches or Bulwarks for defence of the Realm, for every Subject hath benefit by it. And for this by the Common Law, every man may come upon my

my Land for the defence of the Realm, as appears 8 Ed. 4, 23. And in ſuch caſe on ſuch extremity they may dig for Gravell, for the making of Bulwarks; for this is for the publick, and every one hath benefit by it: but after the danger over, the Trenches and Bulwarks ought to be removed, ſo that the Owner ſhall not have prejudice in his Inheritance: And for the Common-wealth, a man ſhall ſuffer damage; as, for ſaving of a City or Town, a Houſe ſhall be plucked down if the next be on fire: And the Suburbs of a City in time of War for the common ſafety ſhall be plucked down, and a thing for the Common-wealth every man may do without being liable to an action, as is ſaid in the 3 H. 8. fol. 15. And in this caſe the Rule is true, Princeps & Reſpublica ex juſta Cauſa poſſunt rem meam auferre.

It was reſolved that this taking of Saltpeter is a purveyance of it for the making of Gun-powder, for the neceſſary defence and ſafety of the Realm. And for this cauſe, as in other Purveyances, it is an incident inſeparable to the Crown, and cannot be granted, demiſed, or tranſferred to any other, but ought to be taken only by the Miniſters of the King (as other Purveyances ought) and cannot be converted to any other uſe than for the defence of the Realm, for which purpoſe only the Law gave to the King this Prerogative: And it is not like to the Mynes of Gold and Silver, for there the King hath intereſt in the Mettall, and for this, there he may dig for it, Quia quando lex aliquid alicui Concedit, Concedere videtur id, ſine quo res ipſa eſſe non Poteſt: Vide Plow. Com. in le Caſe de Mynes. So the King may dig in the Land of the Subject for Treaſure trove, for he hath property: And if the Powder which is ſo made by the Miniſters of the King, begin to decay (as it will in two years) then it ought to be changed for other, or the money comming of it ought to be imployed for Powder for the defence of the Realm; or the Miniſters of the King ought to make proviſion of Saltpeter which will endure a long time, and when need is, to make it into Gun-powder, which may be made before the Navy can be put readineſſe. 3. Point.

The Miniſters of the King cannot undermine, weaken, or impair any of the Walls or foundation of any Houſes, be they Manſion houſes, or Out-houſes, or Barns, Stables, Dove-houſes, Mills, or any other Buildings: And they cannot dig in the Floor of my Manſion houſe which ſerves for the habitation of man, for this, that my houſe is the ſafeſt place for my refuge, ſafety, and comfort, and of all my Family; as well in ſickneſſe as in health, and it is my defence in the night and in the day, againſt Felons, Miſdoers, and harmfull Animals; And it is very neceſſary for the Weal-publick, that the habitation of Subjects be preſerved and maintained. 4. Point.

And there are two notable Preſidents, by which it appears, that the King by his Prerogative had power to prohibite Depopulation, and provide for habitation.

The one in the 43 Ed. 3. Rot. clauſ. in turri. numero 23. pro villa de Southampton.

The other, An 21 R. 2. in dorſo Clauſe. par. 1 N 15. by which the King prohibites that, Incolæ villarum predictarum non proſternant domus ſuas in villis predictis in alias migraturi regiones, &c.

Alſo the Miniſters of the King cannot dig the floor of any Barn imployed for the ſafe cuſtody of any Corn, Hay, &c. of the Owner, for that the floor of a Barn cannot be made dry and ſerviceable again in a long time: But they may dig in the floors of Stables and Dre-houſes, ſo that there

be ſufficient room left for the Horſes and other Cattell of the Owner: And ſo that they repair it in convenient time, in ſo good plight as it was before; Alſo they may dig in the floors of Cellars and Vaults, ſo that there be ſufficient room for the neceſſaries of the Owner; and ſo that the Wine, Beer, and other neceſſary proviſion of the Owner be not removed, or in any ſort impaired. And they may dig any mud-walls which are not the Walls of any Manſion houſe, ſo that order be taken that the Manſion houſe be well defended, as it was before; ſo they may dig in the ruines and decaies of any Houſe or Buildings, which are not preſerved for the neceſſary habitation of men.

5. Point. They ought to make the places, in which they dig, ſo well and commodious to the Owner as they were before.

6. Point. They ought to work in the poſſeſſion of the Subject, but betwixt Sun riſing and ſetting; ſo that the Owner may make faſt the Doors of his Houſe, and put it in defence againſt Miſdoers.

7. Point. They ought not to place or fix any Furnace, Veſſells, or other neceſſaries in any houſe or building of the Subject without his conſent, or ſo neer any Manſion houſe, as by it, it may receive prejudice or diſquiet.

8. Point. They ought not to continue in one place over a convenient time, nor to return again into the ſame place before convenient time (which is long time) be paſſed.

9. Point. It was reſolved that the Owner of the Land cannot be reſtrained from digging and making Saltpeter, for the King hath not intereſt in it as he hath in Gold and Silver in the Land of the Subject, for the King in the caſe of Saltpeter hath but purveyance, ſo that the property of it is in the Owner, and for that he cannot be excluded of the Commodity in his own Land.

And it is to be obſerved, that before 31 Eliz. which was the next year after the Spaniſh Invaſion, there was not any licenſe or commiſſion of any King or Queen of this Realm, for the taking of Saltpeter: But in the ſaid 31. yeare there were two Licenſes granted.

The one particular to George Conſtable Eſquire, and the other generall to George Evelin, Richard Hills, and John Evelin. The firſt gives Conſtable power and authority for eleven years to dig open and work for Saltpeter within the County of York, Nottingham, Lancaſter, Northumberland, Cumberland, and the Biſhoprick of Dureſme, as well within Our Lands, Grounds, and Poſſeſſions, as alſo within the Lands, Grounds, and Poſſeſſions of any of our loving Subjects within the Counties aforeſaid: And the conſideration of the Patent was for a great quantity of Saltpeter yearly by the ſaid George Conſtable, to be made and provided for the Store of the Queen, at a lower rate then before was paid.

And further, Our will and pleaſure is, that the ſaid George Conſtable, &c. ſhall at his own proper coſts and charges, erect, make up, and lay all mud-Walls, Stables, and Grounds whatſoever ſo digged up, &c. In which licenſe it was obſerved, that no power is given to dig in any Manſion houſe, Barns, Dove-houſes, &c. but, as appears in the laſt Clauſe, in mud-Walls, Stables, and grounds, for the Clauſe of reparation ought without queſtion to extend to all the places to which the power to dig extends, &c.

The other Commiſſion to Evelin, &c. extends to all the Realm of England

land and Ireland, and all other Dominions of the King, as well within our own Lands, Grounds, and Poſſeſſions, as alſo within the Lands, Grounds, and Poſſeſſions of any of our Subjects.

Note, the Licenſe begins with Lands, &c. ſo that Houſes nor Buildings are not named in it: for the Learned Counſell of the Queen, as it ſhould ſeem, who drew the Licenſe, thought not that the Licenſe ought to extend to the Manſion houſe, or other neceſſary houſes; for otherwiſe it would have been expreſſed in the Licenſe. And after, Scilicet 18. October 2 Jac. Commiſſion was granted to Evelin, and others, to take Saltpeter in the Lands, Poſſeſſions and other convenient places, and in convenient times, ſo that there were but three Licenſes or Commiſſions ever made. And in none of them any power by expreſſe words is given to dig in any Manſion houſe, &c. And in none of them is any Prohibition to the Subject to dig in his own Land: And it is obſerved that in the ſaid laſt Commiſſion is a clauſe, that for carriage none ought to go above nine miles from his own houſe, and that he ſhall have 4d. for every mile laden and empty, viz. Eundo & Redeundo. And the reaſon was, the Owner may return again to his own houſe in the ſame day: And note Reader, here is a good Reſolution of the Juſtices for the true Prerogative of the King in taking purveyance of Saltpeter.

Hill. 4 Jac.

IN this very Term, one George Leak a Cleark in Chancery, had upon an ordinary peece of Parchment, by great deceit, fixed with a kind of Glew, another Parchement ſo thin, as art could make it, ſo that it did appear but one peece of Parchment; And upon the thin peece which was as it were the ſuperficies of the other, he writ by good warrant a Licenſe, which was brought to the Lord Chancellor, & ſealed with the great Seal: And after, the ſaid George took the thin peece upon which the writing was, from the other Parchment to which the great Seal was affixed, and then all was a blanck which the great Seal annexed: And after the ſaid George writ upon the blanck a grant of the King of certain Lands: and what offence this was, was this Term debated amongſt the Juſtices; And it was a great queſtion amongſt them, Whether this was high Treaſon or no: And it ſeemed to me, that this cannot be adjudged high Treaſon, untill it was ſo declared by Parliament: For true it is, that the Statute of 25 Ed 3. declares that if a man do counterfeit the great Seal or privy Seal, that this is high Treaſon: And true it is, that the Judges in times paſt. Viz. 2 H. 4. 25. have adjudged that the taking of that which was printed with the great Seal, from one Patent & fixing of it to another Writing made in the name of the King is a counterfeiting of the great Seal, for this that he abuſeth the ancient Seal, in removing of it from the Patent, and fixing of it on another without warrant: And ſo Stamford lib. 1. fol. 3. proves that it was adjudged in his time; and yet 40. Aſſ. pla. 33. that it was petite Treaſon after the Statute: And 37 H. 8. Title Treaſon; Brook by the Juſtices that this was not Treaſon: And I have ſeen a Record of 2 H. 4. the 25. where the party was indicted generally for counterfeiting of the Great Seal; And the Jury found him not guilty of counterfeiting of the Great Seal, as it was ſuppoſed by the Indictment: And found over the eſpeciall matter, that he took the Great Seal from one Patent, and fixed it to another, and put this in execution: And judgment is given againſt the party. But without queſtion againſt the Law, for as much as they found him not guilty of counterfeting, for this is a full Verdict, and all all the reſt is Surpluſage; but this caſe in queſtion much differs from it, for in this Treaſon.

this case George Leak hath not any medling with the Great Seal, but this remains now annexed as it did before: And for this reason it seems to me, if the Seal be fixed to a blanck Patent, and one writes a Grant in it, contrary to his direction and trust; or if one hath Letters Patents with good warrant made, and them raise in a place materiall, and put in other words, to the great prejudice of the King: In none of these cases can it be adjudged a Counterfeiting of the great Seal. For the Statute of 25 Ed. 3. doth not speak of counterfeiting of writings, but only of the great Seal, And the Delinquent in this case doth not meddle with the Seal, but only with the Writing. And I shewed a notable president in Clauf. 42. Ed. 3. memb. 8. in dorso, where the Case was, that King R. 1. by his Charter granted divers Lands and Liberties, Abbati de Bruera, in which the Abbot raised out this Fiffetruda, and in stead of it writ Eft-leigh. And upon shewing of it obtained a Confirmation of it from King Ed. 3. And an allowance of it in Banco R. And for this offence the said Abbot was called before the King and his Council, Viz. in the Star-Chamber; where the Abbot charged one Robert Rigg his Com-monk, with the rasure: And the Abbot was convict (which could not be but in Court) And it was part of the Sentence, that the said Charter-confirmation and allowance of it, should be brought in by the Abbot to be cancelled. Out of which Record, I do observe five things.

1. The antiquity of the Star-Chamber, and this then was a Court, in which the Abbot was convict, and sentence given.

2. That the said Rasure was not any Counterfeit to the Great Seal; for if the offence had been high Treason, it should not have been determined before the Councill of the King in the Star Chamber.

3. That Spirituall persons were then punishable for offences before temporall Judges.

4. That if there be rasure of a Deed between Subject and Subject, in a place materiall, all the Deed becoms naught: And the party to plead to it Non est factum. So, if the Patentee rase his Letters Patents in any place materiall, all the Patent becoms of no force by the Law, as appears by the said Sentence, All the Patent and all the dependance upon it, Viz. The confirmation and allowance of it, should be all cancelled and defaced.

5. That although that it is commonly said, that an Abbot can do nothing in prejudice of his house, yet in this case he may do it, for the King ought not to be in worse case then a Subject: And if the Abbot had rased a Charter made to him by a Subject, in such a manner as he had rased the Charter of the King, the Deed of the Subject had become of no force: And so in case of the King. And then I conclude, that if the rasing of a Word in the Patent of the King, be not Treason, the rasing of two or three, or all the words of the Patent, and Writing a new Grant, is not treason: And I recited another President in An. R. 2. in Parliament, where the case was, that the Ambassador of the Duke and State of Genoa being here under the safe conduct of the King, for the busines of the King and the Realm, was murthered by certain Subjects of the King: And this matter was debated in Parliament, and there resolved, declared, and decreed, that this was treason: Note it well, this case was not referred to the Judges, but was declared in and by Parliament: For it is provided by the said act of 25 E. 3. that for this that many other cases of like Treason, might happen in time to come, which men cannot think nor declare at present, that if another case, supposed Treason, and which is not specified in the act, shall come before any of the Justices, the said Justices shall stay without going to Judgment of Treason, until the case be shewen

John—— Imperiall.

ſhewn before the King in Parliament, who ought to adjudge it Treaſon or other Felony; In which branch two things are to be obſerved.

1. That although a caſe happen like to the caſes of Treaſons mentioned in the ſaid act, that the Judges ought not (as they do in other caſes by equal and like reaſon) adjudge it to be Treaſon, for that branch reſtraines them: But this ought to be declared in Parliament: for the words of the Act are, Forasmuch as many other caſes of Treaſon, like, &c. The ſecond thing is, that when a particular caſe (as the ſaid caſe of an Ambaſſadour of a King) was adjudged high Treaſon, Et legatos violare contra jus gentium eſt: And it appears 2 Reg. cap. 10. Hamon Rex Amonitarum Legatos Davidis contumeliis, &c. ſuper quo acerrimum bellum movetur, &c. By which it appears the conſequence of an abuſe of an Ambaſſadour, &c. Quod talis injuria eſt juſti belli cauſa. Note that Legatus ejus vice fungitur, à quo deſtinatur; et honorandus eſt, ſicut ille cujus vicem gerit. And afterwards George Leake, upon Examination before the Chief Juſtice of ENGLAND, made a cleer confeſſion of all the manner and circumſtances of the fact: And upon examination, the caſe (as it was delivered to the Juſtices to conſider of it, and to give their opinions) was ſuch; George Leake joyned two blanck Parchments fit for Letters Patents, ſo cloſe together with mouth Glew as they were taken for one, and did put one Label through them both; Then upon the uppermoſt he writ a true Patent and got the Great Seal put to the Label, ſo the Label and the Seal were annexed to both the Patents, the one written and the other blanck, then he cut off the glewed skirts round about, and took off the uppermoſt thin Parchment (which was written, and was a perfect Patent) from the Label which with the great Seal did ſtill hang to the blanck Parchment; then he writ another Patent within the blanck Parchment, and did publiſh it as a good Patent: Hereupon two Queſtions were moved.

1. Whether this offence be high Treaſon or no?

2. If it be high Treaſon, then whether he may be indicted generally for the counterfeiting of the great Seale, or elſe the ſpeciall fact muſt be expreſſed: And the Juſtices were divided in Opinion in the firſt poynt of the caſe: And my ſelf and divers others held that this act was neither high-Treaſon nor petit-Treaſon, becauſe it is not within either of the branches of the ſaid ſtatute of 25 Ed. 3. But it is a very great miſpriſion; and the party delinquent liveth at this day. But the Chief Juſtice and divers others were againſt us; And by reaſon of the diverſity of opinions, Reſpectuatur, vide Fleata lib. 1. cap. 22. Item crimen Falſi dicitur, cum quis illicitus cui non fuerit ad hæc data authoritas de ſigillo Regis rapto vel invento et brevia cartaſii conſignaverit, As to the ſecond poynt it was reſolved that if the ſpecial matter had amounted to counterfeiting of the Great Seal in Law within the ſaid Statute, then he might have been generally indited of high-Treaſon for counterfeiting the great Seal: as if a man in affray kill a Conſtable & comes to keep the Kings peace without any expreſs malice prepenſed, this is murder in Law; and yet the delinquent may be generally indited of murder by malice prepenſed. 25 H. 8. cap. 12.

Hill. 24. Eliz.

Cuſtome.

IN the Exchequer; a Merchant brought eighty weights of Bay-ſalt, by Sea, to a Haven in England, and out of the Ship ſold twenty weighs, and diſcharged them to another Ship in which they were tranſported: But the ſaid twenty weighs were never actually put on the ſhore: And for the reſidue, Viz. 60. he agreed for the Cuſtome, and put them upon Land: And now the doubt was upon the words of the Statute of 1 Eliz. cap. 11.

ing Exportation, Viz. ſent from the Wharf, Key, or other place on the Land, and concerning Importation take up, diſcharge, and lay on Land: If in this caſe the ſaid twenty weights which a Lwayes were water-born, and never touched the land, ought to pay cuſtome as well inwards as outwards.

And it was reſolved, that in both the caſes cuſtome ought to be paid; for the diſcharging out of the Ship upon the Sale aforeſaid, amounts in Law to a putting them upon the land, for in the Law this is Infra corpus comitatus: And if the Law ſhall not be ſo taken, the King may be defrauded of all his Cuſtome, and in the caſe foraſmuch as no cuſtome was paid, it was reſolved that the goods were forfeited, &c.

Note, a good diverſity when the King ſhall be bound by act of Parliament, ſo that he cannot diſpence with it by any clauſe of Non obſtante. No act can bind the King from any Prerogative which is ſole and inſeparable to his perſon, but that he may diſpence with it by a Non obſtante: As a Soveraign power to command any of his ſubjects to ſerve him for the publike-Weal: And this ſolely and inſeparably is annexed to his perſon: And this Royall power cannot be reſtrained by any act of Parliament, neither in Theſi, nor in Hypotheſi, but that the King by his Royall Prerogative may diſpence with it: for upon commandment of the King, and obedience of the Subject, doth his Government conſiſt: As it is provided by the Statute of 23 H. 6. cap. 8. that all Patents made or to be made of any Office of a Sheriff, &c. for tearm of years, for life, in Fee-ſimple, or in tail, are void and of no effect, any Clauſe or Parole non obſtante, put, or to be put into ſuch Patents to be made, notwithſtanding. And further, whoſoever ſhall take upon him or them to accept or occupy ſuch Office of Sheriff by virtue of ſuch Grants or Patents, ſhall ſtand perpetually diſabled to be or bear the Office of Sheriff within any County of England by the ſame authority: and notwithſtanding that by this act, 1. The Patent is made void. 2. The King is reſtrained to grant Non obſtante. 3. The Grantee diſabled to take the Office, yet the King by his Royall Soveraign power of Commanding, may command by his Patent, (for ſuch cauſes as he in his Wiſdome doth think meet and profitable for himſelf and the Common-Wealth, of which he himſelf is ſolely judge) to ſerve him and the Weal-publike, as Sheriff of ſuch a County for years, or for life, &c. And ſo was it reſolved by all the Juſtices of England, in the Exchequer Chamber. 2 H. 7. 66. And ſo the Royall power to pardon Treaſons, Murders, Rapes, &c. is Prerogative incident ſolely and inſeparably to the perſon of the King: And for this Non obſtante an act of Parliament, to make the pardon of the King void and reſtrain the King to diſpence with this by Non obſtante, and to diſable him to whom the pardon is made, to take or plead, it ſhall not bind the King but that he may diſpence with it: And this is well proved by the act of 13 R. 2. Parliament. 2. cap. 1. For by this it was enacted, that no Charter of Pardon, from henceforth be allowed by whatſoever Juſtices, for Murders, Treaſon, Rape of a Woman, nor be ſpecified in the ſaid Charter, and if it be otherwiſe, Be the Charter diſallowed.

Note, this was the ſureſt way that the Parliament could take to reſtrain the King to pardon Murder, unleſs that he pardon it by expreſs termes, which they thought the King would not, for they knew that the King could not be reſtrained by any act to make a Pardon; for mercy and power to pardon is Prerogative incident ſolely and inſeparably to the perſon of the King: And it hath oft-times been adjudged that the King can pardon Murther by generall words without any expreſs mention, with Non obſtante the ſaid Statute, ſee 4. H. 4. cap. 31. In which it is declared that no Welſhman, be Juſtice, Chamberlain,

lain, Treasurer, Sheriff, Steward, Constable of a Castle, Escheator, Coroner, or chief Forrester, nor other Officer whatsoever, nor keeper of Records, &c. in any part of Wales, notwithstanding any Patent made to the contrary, with clause of Non obstante licet sit Wallicus natus: And yet without Question, the King may grant with a Non obstante. So Purveyance for the King and his Houshould, is incident solely and inseparably to the person of the King: And for this cause, the act of Parliament held in time of Henry 3. De tallagio non concedendo, Title purveyance, Rastall, which bars the King wholly of Purveyance, is void, as it appears in Co. lib. fol. 69. But in all such cases, although that the King may dispence with Statutes, yet a generall dispensation or grant without Non obstante is void: But in things which are not incident solely and inseparably to the person of the King, but belongs to every Subject and may be severed, there an act of Parliament may absolutely bind the King: As if an act of Parliament do disable any Subjects of the King, to take any land of his Grant, or any of his subjects (as Bishops) as it is done by the Statute 1 Jac. cap. 3.) to grant to the King, this is good; for to Grant or take Lands or Tenements, is common to every subject: And for this it is not Proprium quarto modo, to Kings, Scilicet omni soli et semper, vide the Case of Deans and Chapters upon the Statute of 13 Eliz. vide 8. R. 2. cap. 2. & 33. H. 6. That none shall be Justice of Assize, &c. in the County where he was born, or did inhabite, and yet the King with speciall Non obstante may dispense with this, for this belongs to the inseparable Prerogative of the King, viz. his power of commandment to serve, &c.

Hill. 4. Jac. Regis.

NOte, Mich. 4. Jac. Post Prandium, There was moved a question amongst the Judges and Serjeants at Serjeants Inne, If the high Commissioners in Ecclesiasticall causes, may by force of their Commission imprison any man or no? High Commissioners, if they have power to Imprison.

First of all it was resolved, by all, that before the Statute of 1 Eliz. cap. 1. the King might have granted a Commission to hear and determine Ecclesiastical causes: But then notwithstanding any clause in their Commission, the Commissioners ought to proceed according to the Ecclesiasticall Law allowed within this Realm, for he cannot alter neither his temporall nor his Ecclesiasticall Laws within this Realm by his Grant or Commission: Vide Caudries Case. 5. Report. And they could not in any case have punished any delinquent by Fine or Imprisonment unless they had authority so to do by Act of Parliament. Then all the question rests upon the act of 1 Eliz. which as to this purpose rests upon three branches.

1. Such Commissioners have power to exercise, use, occupy, execute all Jurisdiction Spirituall and Ecclesiasticall.

2. Such Commissioners by force of Letters Patents have power, to visite, reforme, &c. all Heresies, &c. which by any manner of Spirituall or Ecclesiasticall power, &c. can, or lawfully may be reformed, &c. so that these branches limit the Jurisdiction, and what offences shall be within the Jurisdiction, of such Commissioners, by force of Letters Patents of the King: And this is all, onely such Offences may lawfully be reformed by the Ecclesiasticall Law.

3. The third branch is, that such Commissioners after such Commission delivered to them so authorised, shall have power and lawfull authority by vertue

vertue of this Act, and the ſaid Letters Patents, to exerciſe, uſe, and execute all the Premiſſes according to the tenor and effect of the ſaid Letters Patents. This branch gives them power to execute their Commiſſion. But it was objected, that this branch doth not give to the Quæn power by her Letters Patents, to alter the proceedings of the Eccleſiaſticall Law, or gave to the Quæn abſolute power by her Letters Patents, to preſcribe what manner of proceedings, or puniſhment concerning the Lands, Goods, or bodies of the Subject; And this appeares by the Title of the act reſtoring to the Crown the ancient Juriſdiction, ſo that the intent was to make reſtitution, and not any innovation in proceeding or puniſhment: And it was obſerved that this laſt branch gave to them power to execute all the Premiſſes; according to the tenor and effect of the ſaid Letters Patents, ſo that theſe words So authorized in the ſaid Letters Patents, have relation only to the authority of the Letters Patents, before ſpecified, Viz. ſuch as gave to them power to viſite, reform, redreſs, order, correct, and amend, all Errors, Hereſies, Schiſms, Abuſes, Contempts, and Enormities whatſoever; which by any manner of Spirituall or Eccleſiaſticall power, can or may lawfully be reformed, &c. Theſe are the tenor and effect of the Letters Patents, before remembred: And if any other conſtruction ſhall be made,

1. It ſhall be againſt the expreſs Letter, Scilicet, ſaid Letters Patents.

2. It ſhall be full of great perill and inconvenience, for then not only impriſonment of body, but confiſcation of Lands, Goods, &c. And ſome corporall puniſhment may be impoſed, for Hereſie, Schiſm, Incontinence, &c. Alſo power may be given to them to burn any man for Hereſie, which ſhall be againſt the common Law of the Land.

See *Simpſons* caſe in the forty ſecond of *Eliz.* now reported by my Lord *Coke* in 4. Inſt. 333.

Of the Stealing of Women.

Weomen. Felony.

NOte the Statute of 3 H. 7. cap. 12. ſtands upon a preamble and a purview; the preamble is, Where Women, as well Maides as Widows and Wives having ſubſtance, &c. and ſome being Heirs apparent, &c. for the lucre of ſuch ſubſtance, be oftentimes taken by Miſdoers, contrary to their wills, and after married, &c. or defiled: So note theſe three words in the Preamble, Viz.

1. Be taken.
2. Be married.
3. Be defiled.

The Purview is, that what perſon or perſons from henceforth that taketh any woman ſo againſt her will unlawfully, Viz. Maid, Wife, or Widow, that ſuch taking, procuring, and abetting to the ſame, and alſo receiving the ſaid Woman ſo taken againſt her Will and knowing the ſame, be fellony. And that ſuch Miſdoers, Takers, and Procurers to the ſame, and Receivers, knowing the ſaid Offence in forme aforeſaid, be henceforth reputed and judged as Principall Felons, ſo that it is not ſaid in the Purview ſo taken, married, or defiled, but onely ſo taken againſt their will: And upon this great Queſtion was moved, 4 & 5 Phil. & Mar. in the Star Chamber, If the Eloynment againſt her will, without marriage, or carnall copulation (which is intended by this word Defiled) be Fellony or no: And the Opinion of Brook and ſome other of the Juſtices was, that it was Fe-

lony

Felony; But Sanders chief Justice was against it; and afterwards, as Periam chief Baron did report, It was resolved by all the Justices in the 26 Eliz. that such Eloynment only is not Felony by the intent of the Staute, without marriage or carnall copulation, for the mischief was not only the taking, but the marriage or the defiling, which was (as it was said in the Preamble) to the disparagment of the said woman, and utter heavinesse and discomfort of her friends: And the Purview ought to pursue the mischeif.

Secondly, this word So, hath reference to the Preamble, and all the mischief contained in it.

Note by the expresse Purview of the Act, the accessary both before and after is made principall; &c. but by a construction of the Common law they that receive the misdoers and not the women are accessaries: for this act makes the receivers of the women the principals.

Pasch. 4. Jac. Regis.

NOte by the commandment of the King, it was referred to Popham chief Baron, and my self, what right the Queen which now is, hath, and in what cases to a Right claimed by her, called Aurum Reginæ, that is to say, Pro centum marcis argenti una marca auri solvend. per illum qui sponte se obligat: And upon consideration had of it by a long time and view of all the Records and Presidents, Viz. Librun Rubrum in scaccario, fol. 56. de Auro Reginæ, where it is said, that this is to be taken De iis qui sponte se obligant Regi, &c. which is the foundation of this Claim; And of a Record in the Tower, 52 H. 3. And of a Record in the Exchequer, 4 E. 1. and of a Record in the Exchequer, Hill. 12. Ed. 3. And in the Tower in the same year, in Rot. claus. And of Acts of Parliament, 15 Ed. 3. cap. 6. & 31 Ed. 3. cap. 13. and the 13 R. 2. in Turri, and divers other Presidents and Processe out of the Exchequer in the time of R. 2. H. 4. and other Kings. until the time of H. 7. Aurum Reginæ.

It was resolved that the Queen hath right to it, but with these limitations. Resolution.

1. That it ought to be Sponte by the Subject Sine coactione, so that this ought to be at the pleasure of the Subject, whether he will offer, or give, or no: And for this all Fines upon Judgment, or by offer or fine for alienation, or in any other case where the Subject doth not do it Sponte sine aliqua coactione, Viz. That the King of right ought to have it, there the Queen shall have nothing.

2. It ought to be Sponte sine consideratione alicujus reventionis seu intereſſe, That the King hath in Esse, in Jure Coronæ: And for this upon sale or demise of his Lands, or Wards, or Goods of Fellons, Out-lawes Et simili casu, for these are Contracts & Bargains concerning the Revenews and Interests of the King: And it cannot be said in such case that the Subjects Sponte se obligant, as to purchase or buying any the Revenews or Interests which the King hath.

3. It ought to be Sponte super considerationem, & non ex mera gratia & benevolentia Subditi, For that which is of meer Grace is not properly said of Obligation or Duty, and the words of the Records are to have De iis qui sponte se obligant, And so was it ordained by the King and his Councell, as appears by the Record of Hill. 4. E. 1. in Scaccario, &c.

4. It ought to be Sponte super considerationem quæ non attingit reventionem seu intereſſe Coronæ, in any thing which the King hath: As if the

Subject give to the King Sponte a summ of mony for license in Mortmain or for to create a Tenure of himself, to have a Fair, Market, Park, Chase, or Warren, within his Manor, there the Queen shall have it: For the Subject did this Sponte, and was not constrained to it: And this doth not concern any Revenue or Interest of the King: But if the King hath a Fair, or Market, or Park, or Warren, and grant it for a summ of money, there the Queen shall have nothing; for this was a thing in Esse, and parcell of the Revenue of the Crown: And by that it appears, that forasmuch as little or nothing is given in such case where this of right is due, this is not now of any such value as was pretended: And this resolution was reported to our Soveraign Lord the King by Popham, in the Gallery at Whitehall.

Pasch. 5. Jac. R.

Forests. Chases.

IN this same Term it was informed to the King that great wrongs were don in his Forest of Leicester in the County of Leicester: And in his Forest of Bowland in the County of Warwick, &c. parcell of his Dutchy of Lancaster: And upon this, by warrant of the King under his Signet, all the Justices were assembled to resolve certain Questions, to be moved concerning the Forests by the Attorney of the Dutchy, and the Counsell of the other part, Which were Forests & which Chases; the which being matter in fact, the Judges could not give their resolutions but by a way of direction: And it was resolved by them, that if these are Forests, it will appear by matter of Record, as by Eyres of Justices of Forests; Swannymotes Officers of Forests, as Regardors, Agisters, Verderors, &c. But the appellation of it by the name of a Forest in Grants, Offices, and Conveyances, is not any proof that this is a Forest in Law.

2. It was resolved by all the Justices, that if these are not other then free Chases, and no Forests in Law, then he who hath any Free-hold within them, may cut his Timber and Wood growing upon it, without any view or license of any: But if he cut so much, that there is not sufficient for Covert, and to maintain the Game of the King, he shall be punished at the suit of the King. And so if a common person hath Chase in another Soil, the Owner of the Soil cannot destroy all the Covert, but ought to leave sufficient Covert, and sufficient Brouse-wood, as hath been accustomed.

3. It was resolved, that within such a Chase the Owner of the Soil by prescription may have Common for his Sheep, and Warren for Conies, by grant or prescription: But he cannot surcharge with more then hath been used, then from which, &c. nor make Burrowes in other places then hath been used from the time of which, &c. unlesse he hath Warren by Grant, and then he may use it according to his Grant; but he cannot erect a new Warren without Charter.

4. It was resolved, that he who hath such a Warren may lawfully build upon his Inheritance, within his Warren, a convenient Lodge for preservation of his Game,

5. It was said by Popham chief Justice, that it was adjudged in the time of the chief Baron Bell, in the Exchequer, that a man may prescribe to cut his Wood upon his own Inheritance within a Forest, although it was against the Act in the 43 Ed. 1. which is in the Abridgment Title Forest

reſt 21. And this was the caſe of Sellenger, for the Wood in the Foreſt of Hay in the County of Hereford: And their reaſon was for this, that this was but a Declaration of the Common Law, and it may be tolled by Cuſtom, as Littleton ſaid: vid. 2. Ed. 2. Title Treſpaſſe. fol 9. in the time of Ed. 1. Treſpaſſe 239. Plowd. Com. Dyer 72. 322 Ed. 4. cap. 7. that the Subject may have a Foreſt: But this is intended if he hath power to have Swaynnimotts and Juſtices in Eyre and Foreſters appendant to his Foreſts.

Conſuetudo ex rationabili cauſa uſitata privat communem legem: And it was held by ſome that this was but an Ordinance, and not any Act of Parliament.

Paſch. 5. Iac. Regis.

IN this very Term between Rice ap Evan ap Floyd, and Richard Barker, one of the Juſtices of the Grand Seſſions in the County of Angleſey, and others defendants: It was reſolved by Popham and Cook cheif Juſtices, the chief Baron, and Egerton Lord Chancellor, and all the Court of Star Chamber, that when a grand Inqueſt inicts one of Murther or Felony and after the party is acquitted, yet no conſpiracy lies for him who is acquitted, againſt the Inditors, for this that they are returned by the Sheriff by proceſſe of Law to make enquiry of Offences upon their Oath, and it is for the ſervice of the King and the common-wealth. And as it is ſaid in the 10 Eliz. 265. they are compellable to ſerve the Law, and the Court; And their Indictment or Verdict is matter of Record, and called Veredictum, and ſhall not be avoyded by ſurmiſe or ſuppoſall, and no attaint lies. And for this reaſon they ſhall not be impeached, for any conſpiracy or practice, before the Indictment: For the Law will not ſuppoſe any unindifferent, when he is ſworn to ſerve the King: And with this agrees the Books in 22 Aſſ. 77. Aſſiſe. p 12. 21 Ed. 3. 17. 16 H. 6. 19. 47 Ed. 3. 17. 27 H. 8. 2. F. N. B. 115. a. But it is otherwiſe of a Witneſſe; for if he conſpire out of the Court and after ſwear in the Court, his Oath ſhall not excuſe his conſpiracy before; for he is a private perſon, produced by the party and not returned by the Sheriff, who is an Officer ſworn, and the Jurors are ſworn in Court as in different perſons: And the Law preſumes, that every Juror will be indifferent when he is ſworn; Nor will the law admit proof againſt this preſumption.

Conſpiracy doth not lye againſt a Juror or Indictor, but againſt a witneſſe.

2. It was reſolved, that when the party indicted is convict of Felony by another Jury upon Not guilty pleaded, there he never ſhall have a Writ of Conſpiracy, but when the party upon his arraignment is Legitimo modo acquietatus: But in the caſe at the Bar, the Grand Jury who indicted one William Price for the murther of Hugh ap William, the Jury, who upon Not guilty pleaded, convicted him, were charged in the Star-Chamber for Conſpiracy againſt him, and indicted and convicted, which manner of Complaint was never ſeen before: for if the party ſhall not have a Conſpiracy againſt the Inditors, when the Priſoner is acquitted upon his Indictment; à Multo fortiori when he is lawfully convict, he ſhall not charge neither the Grand Inqueſt by whom he was indicted, nor the Jury who found him guilty. For the Law in ſuch caſe doth not give any Attaint, for this that he was indicted by the Oath of twelve men at the leaſt, and found guilty by twelve. And in theſe Caſes, the King is the ſole party to the proceedings againſt the Priſoner: But on the other ſide, when a Jury hath acquitted a Felon or Traitor againſt manifeſt proof, there they may

may be charged in the Star-Chamber, for their partiality in finding a manifest Offendor not guilty, Ne maleficia remanerent impunita. And it will be a cause of infinite vexation and occasion of perjury and smothering of great Offences, if such averments and supposals shall be admitted after ordinary and judiciall proceeding: And it will be a means Ad deterrendos & detrahendos juratores a servitio Regis.

3. It was resolved that the said Barker who was Judge of Assise, and gave judgment upon the verdict of death, against the said W. P. and the Sheriff who did execute him according to the said Judgment, nor the Justices of Peace who did examine the Offender, and the Witnesses for proof of the murther before the Indictment, were not to be drawn in question, in the Star Chamber, for any Conspiracy nor any witnesse, nor any other person ought to be charged with any Conspiracy in the Star Chamber, or elsewhere, when the party indicted is convicted or attaint of Murther or Felony: and although the Offender upon the indictment was acquitted, yet the Judge, be Judge of Assise, or a Justice of Peace, or any other Judge, being Judg by Commmission and of Record, and sworn to do Justice, cannot be charged for Conspiracy, for that which he did openly in Court as Judge or Justice of Peace: And the Law will not admit any proof against this vehement and violent presumption of Law, that a Justice sworn to do Justice will do injustice, but if he hath conspired before out of Court this is extrajudicial, but due examination of Causes out of the Court, and enquiring by testimonies Et similia, is not any Conspiracy, for this he ought to do; but subornation of Witnesses, and false and malicious prosecutions, out of Court, to such whom he knowes will be Indictors, to find any guilty, &c. amounts to an unlawfull Conspiracy.

And if Records are of so high a nature, that for their sublimity they import verity in themselves; And none shall be received to aver any thing against the Record it self, And in this point the Law is founded upon great reason, for if the Judiciall matters of Record should be drawn in question, by partiall and sinister supposalls and averments of Offenders, or any on their behalfe, there will never be an end of Causes: But Controversies will be infinite, Et infinitum injure reprobatur: And for this it is adjudged in the 47 Ed. 3. 15. That a Judge who hath a Commission, Viz. That is of Record, shall not be charged in Conspiracy; which is to be understood of what he did in Court, for the reasons and causes aforesaid: And with this agrees the Book, 21 Ed. 4. 67. & 27 Ass. pl. 12. And the reason is for this, that the party is acquitted; and the accusing stands with the Record: And accordingly was the Law taken in this case: But in a Hundred Court, or other Court which is not of Record, there averment may be taken against their proceedings, for that it is no other then matter in Pais and not of Record: As it appears in the 47 Ed. 3. 15. Also one shall never assign for Error, against that which the Court doth as Judges, as to say that the Jury gave Verdict for the Defendant, and the Court did enter it for the Plaintif, or to say that the party who levied the Fine was dead before the Fine was levied, or such like, Vide 1 H. 6. 4. 39 H. 6. 52. 7 H. 7. 11 H. 7. 28. 1 Mar. Dyer 89. But in a Writ of false Judgment, the Plaintif shall have direct averment against that which the Judges in the inferior Court, have done as Judges, Quia Recordum non habent, and with this accords 21 H. 6. 34. And as a Judge shall not be drawn in question in the Cases aforesaid, at the suit of the parties, no more shall he be charged in the said Cases before any other Judge at the suit of the King: And for this in the 27 Ass. pl. 18. One was indicted and arraigned at the suit of the King, as he was a Justice of Oyer and Terminer, where certain persons were indicted

Averment.

of

of Treſpaſs before him, he made an entry of Record, that they were inicted of Felony : And it was adjudged that this Indictment was againſt the Law for this, that he was a Juſtice by Commiſſion : and that is of Record : And this preſent act ſhall be to defeat the Record, Hoc eſt, to aver againſt that which he did as Judge of Record, which cannot be by the Law, Vide 27 Aſſ. pl. 23. 2 R. 3. 9. 28 Aſſ. pl. 21, 9 H. 6. 60. And it was ſaid, that it was the caſe of one Nudigate, who as a Juſtice of Peace had recorded a force upon a View, which he did as judge upon Record ; And a Bill was exhibited againſt him in this Court, for this, that he had falſely made a Record, where indeed there was not any Force : And by the opinion of Catlyn and Dyer, chiefe Juſtices, it was reſolved, that, That thing that a Judge doth as Judge of Record, ought not to be drawn in Queſtion in this Court.

Note well, that the ſaid matters at the Bar were not examinable in the Star-Chamber : And for this it was ordered and decreed by all the Court, that the ſaid Bill without any anſwer to it, by the ſaid Richard Barker ſhall be taken off the File and cancelled, and utterly defaced : And it was agreed, that inſomuch as the Judges of the Realm have the adminiſtration of Juſtice under the King, to all his Subjects, they ought not to be drawn into Queſtion for any ſuppoſed corruption, which extends to the annihilating of a Record, or of any judiciall proceedings before them, or tending to the ſlander of the Juſtice of the King, which will trench to the ſcandall of the King himſelf, except it be before the King himſelf; for they are only to make an account to God and the King, and not to anſwer to any Suggeſtion in the Star-Chamber ; for this would tend to the ſcandall and ſubverſion of all Juſtice. And thoſe who are the moſt ſincere, would not be free from continuall Calumniations, for which Reaſon the Orator ſaid well, Invigilandum eſt ſemper; multæ inſidiæ ſunt bonis.

And the reaſon and cauſe why a Judge, for any thing done by him as Judge, by the authority which the King hath committed to him, and as ſitting in the ſeat of the King (concerning his Juſtice) ſhall not be drawn in Queſtion before any other Judge, for any ſurmiſe of corruption, except before the King himſelf, is for this; The King himſelf is De jure, to deliver Juſtice to all his Subjects : And for this, that he himſelf cannot do it to all perſons, he delegates his power to his Judges, who have the Cuſtody and Guard of the Kings Oath.

And forasmuch as this concerns the honour and conſcience of the King, there is great reaſon that the King himſelf ſhall take account of it, and no other.

And Thorp who was drawn in Queſtion for corruption, before Commiſſioners, was held againſt the Law, and upon that he was pardoned ; and it is contained in the ſame Record, *Quod non trahitur in exemplum.* Vide the concluſion of the Oath of a Judge, Vide the Chronicle of Stow. 18. Edward 3. 312.

Note, Thomas Weyland Chiefe Juſtice of the Common-bench, Sir Ralph Hengham Juſtice of the Kings Bench : And the other Juſtices were accuſed of Bribery and Corruption, and their Cauſes were determined in Parliament, where ſome were baniſhed, and ſome were fined and impriſoned.

Vide 2 Ed. 3. fol. 27. That the Juſtices of Trayl-Baſton (ſo called for their ſummary proceeding) were in a manner Juſtices in Eyre : And their authority was founded upon the Statute of Ragman, which you may ſee in the old Magna Charta. Vide the form of the Commiſſion of the Trayl-

baſton, Hollingſhead, Chron. fol. 312. And note, it appears by the ſaid Preſident and Chronicle, that the King did examine the corruption of his Judges, before himſelf in the Parliament, and not by force of any Commiſſion.

Abſurdum eſt affirmare, recredendum eſſe non Judici.

An Oath before an Eccleſiaſticall Judge Ex officio.

The Ordinary cannot enforce a man to anſwer generall Articles *Ex officio.*

NOte, Paſch. 4. Jacobi, In the time of the Parliament the Lords of the Councell of White-hall, demanded of Popham chief Juſtice, and my ſelf, upon motion made by the Commons in Parliament, in what caſes the Ordinary may examine any perſon Ex officio upon Oath; And upon good conſideration and view of our Books, we anſwered to the Lords of the Councell at another day in the Councell Chamber,

1. That the Ordinary cannot conſtrain any man Eccleſiaſticall, or Temporall, to ſwear generally to anſwer to ſuch Interrogatories as ſhall be adminiſtred unto them; but ought to deliver to him the Articles upon which he is to be examined, to the intent that he may know whether he ought by the Law to anſwer to them: And ſo is the courſe of the Star-chamber and Chancery; The defendant hath the Copy of the Bill delivered unto him, or otherwiſe he need not to anſwer to it.

2. No man Eccleſiaſticall or Temporall ſhall be examined upon ſecret thoughts of his heart, or of his ſecret opinion: But ſomething ought to be objected againſt him what he hath ſpoken or done: No Lay-man may be examined *Ex officio*, except in two cauſes, and that was grounded upon great reaſon: for Lay-men for the moſt part are not lettered, wherefore they may eaſily be inveigled and entrapped, and principally in Hereſie and Errors: And this appears by an Ordinance made in the time of Ed. 1. Title Prohibition.

Raſtall, the words of which Ordinance are, And *Quod non permittant, quod, alioqui laici in balliva ſua in aliquibus locis conveniant, an aliquas recognitiones per juramenta ſua facienda, niſi in cauſis Matrimonialibus & Teſtamentariis.* And the reaſon that the Eccleſiaſticall Judge ſhall examine them in theſe two Caſes, is for this; that Contracts of matrimony, and the Eſtates of the dead are many times ſecret: And they do not concern the ſhame and infamy of the party, as Adultery, Incontinency, Uſury, Simony, hearing of Maſs, Hereſie, &c.

And for this cauſe in theſe caſes and ſuch like, the Eccleſiaſticall Judge ought not to examine Partem ream, upon their Oath; for as a Civilian ſaid, that this was Inventio Diaboli ad deſtruendas miſerorum animas ad infernum: And in the Regiſter. fol. 36. 6. There is a Prohibition in this forme, Præcipimus tibi quod non permittas quod aliqui laici ad citationem talis Epiſc. aliquo loco conveniant de cætero ad aliquas recognitiones factas vel ſacramenta præſtanda (the one is the expoſition of the other) niſi in caſibus matrimonialibus & teſtamentariis: And there is an attachment upon it, Pone per vadium & ſalem Epiſc: quod ſit coram Juſticiariis noſtris, &c. oſtenſurum quare fecit ſummoniri, & per cenſuras Eccleſ. diſtringi laicas perſonas vel laicos homines & fœminas ad comparendum coram eo ad præſtandum juramentum pro voluntate ſua ipſis invitis in grave Coronæ præjudicium

um & dignitatis noſtræ Regiæ, nec non contra conſuetudinem Regni noſtri: Et habeas ibi Nomina plegiorum, &c. Teſte, &c. by which it doth appear that this was not only againſt the ſaid Ordinance, but alſo againſt the cuſtome of the Realm, which hath bèn, time out of mind, but alſo in prejudice of the Crown and Dignity of the King: And with this agrees F. N. B. fol. 41. And Vide the caſe reported by the Lord Dyer (but the caſe is not printed) Trin. 10. Eliz. one Leigh an Attorney of the Common pleas, was committed to the Fleet by the high Commiſſioners, in a cauſe Eccleſiaſticall, for this, that he had bèn at Bath, and refuſed to ſwear to certain Articles to be propoſed to him. And although in ſuch caſe, Eccleſiaſticall Juriſdiction is ſaved by the Statute of 10 Eliz. yet they ought not in ſuch caſe to examine upon his Oath: And hereupon he was delivered by all the Court of Common Pleas upon the return of the matter upon a habeas corpus.

Note the delivery out of Priſon, was becauſe, the high Commiſſion had no power to imprifon, ſee 2 *Inſt.* 333.

And in Mich. 18. Eliz. Dyer, fol. 175. in Hinds caſe, who would not ſwear Commiſſionariis Eccleſ. ſuper articulos pro uſura, & ea de cauſa commiſſus eſt Gaolæ de le Fleer, He was delivered by Habeas corpus per totam curiam. This alſo was becauſe they could not imprifon.

Vide le Statute, 25 H. 8. cap. 14. Which his declaratory as to this point: It ſtandeth not with the right order of Juſtice nor good equity, that any perſon ſhould be convict and put to the loſſe of his life, good name, or Goods, unleſs it were by due accuſation, and Witneſſes, or by preſentment, verdict, confeſſion, or proceſſe of Outlawry, &c. And it is not reaſonable that any Ordinary, upon ſuſpition conceived of his own fantaſy, without due accuſation or preſentment, ſhould put any ſubject of this Realm in infamy and ſlander of Hereſie, to the peril of life, loſſe of good Name, or Goods; (Et paulo ante) the moſt expert and beſt learned man of this Realm, diligently laying wait upon himſelf, cannot eſchew and avoid penalty and danger, &c. and if he ſhould be examined upon ſuch captious interrogatories, as is and hath bèn accuſtomed to be miniſtred by the Ordinaries of this Realm, in caſe where they will ſuſpect any man of Hereſie: And this was the Judgement of all the ſaid Parliament, ſee F. N. B. Juſtice of Peace 72. Lamb. in his Juſtice of Peace, 338. Crompt. in his Juſtice of Peace. 36. 6. In all which it appears that if any be compelled to anſwer upon his Oath, where he ought not by the Law, that this is oppreſſion and puniſhable before a Juſtice of Peace, a Juſtice of Aſſize, &c. For this is an Article of charge; to enquire of all Oppreſſions: And as to that which was objected, that for a very long time, divers had bèn examined upon Oath in Eccleſiaſticall Courts: As to this it was anſwered, that it might very well be, and not againſt Law, for the words of the Treatiſe or Ordinance, and of the Regiſter, are, Contra voluntatem eorum, &c. So that if any aſſent to it, and take it without exception, that is not Contra voluntatem eorum, But to enforce any to take it, who ought not to take it by the Law, is a great oppreſſion: But if any perſon Eccleſiaſticall, be charged with any thing which is puniſhable by our Law, as for uſury, there he ſhal not be examined upon Oath, for this, that his Oath is evidence againſt him at the Common Law, and to do it incurs the penalty of the Statute, but witneſſes may be cited to teſtifie, Regiſter, title Conſult. F. N. B 53 d. Alſo by the Statute 2 H. 4. cap. 15. it is provided, that Dictus Dioceſſanus per ſe vel per Commiſſarios ſuos contra hujuſmodi perſonas, &c. Et ad omne juris effectum, publice & judicialiter procedat & negotium hujuſmodi, &c. terminet juxta Canonicas ſanctiones, which words, Juxta Canonicas ſanctiones, gives them power to proceed according to their Canons, and excludes the Common Law, and by pretext of this in the caſes mentioned in the ſaid Act, they examine as well Lay-people as Clerks,

Clerks, upon their Oaths concerning Hereſie, erroneous opinions, &c. mentioned in the ſaid act in the Raign of H. 4. H. 5. H. 6. Ed. 4. R. 3. H. 7. unto the time of the ſaid act of 25 H. 8. and for this in the Reign of H. 8. nor in the Raign of Ed. 6. no Lay-man was examined upon his Oath, except in the ſaid two Caſes of Patrimony and Wills: But in the Raign of Queen MARY, this Act of 2 H. 4. was revived, and then all the Martyrs who were burnt, were examined upon their Oaths: And afterwards by the 10 Eliz. the ſaid Act of 2 H. 4. is repealed, by which the Common-Law is in full force and effect: And for this cauſe all the pretence of poſſeſſion and practice which the Eccleſiaſticall Courts have had, is ſtrongly anſwered by this which hath been ſaid, that the words of the ſaid Treatiſe and Regiſter are; Contra voluntatem eorum, &c. And thoſe who have ſo taken it, have aſſented to it, and that ſtands with Law.

Math. Paris, 225. 226, 227. &c.

Note, that King John after he had murthered his Nephew Arthur, and Niece Ellenor, the Iſſues of his elder Brother Geffrey, after he had loſt Normandy, Aquitane, & Anjow, after that his Commons for unjuſt veration diſobeyed him, his Nobles revolted from him, the Clergy oppreſſed by him, and that he ſtood excommunicated by the Pope, and his Kingdome interdicted, he for his protection granted by his Charter of 13 Maii Anno Regni 14. ſubmitted himſelf to the obedience of the Pope: And after in the fourteenth year of his Reign, as one deſtitute of all ſuccour and ſafety, and from day to day in fear to loſe his Crown, by an other charter he reſigned his Crown and Realm to the Pope Innocent, and his Succeſſors, by the hands of Pandolph his Legate, and took it of him again to hold of the Pope, which was utterly void, for this, that the Dignity is an inherent, inſeparable to the Royall blood of the King, and deſcendable to the next of blood of the King, and cannot be tranſferred to another, no more then a Duke, or Earl, or Baron, or other Dignity may tranſfer over their Dignity, for theſe are incidents inſeparable; Alſo the Pope was an Alien born, and therefore was not capable of Inheritance within England: By colour of which ſubmmiſſion and reſignation, the Pope and his Succeſſors exacted great ſumms of the Clergy and Layity of England, Pro commutandis pœnitentiis, to maintaine the height and dignity of the Pope. And for the better inriching of the Coffers of the Pope, Pope Gregory the ninth, ſent Otho Cardinalis de Carcere Tulliano, into this Realm, when there was indignation betwixt H. 3. and his Nobles, to collect money for the Pope, who did collect infinite ſumms of money, ſo that it was ſaid of him, Quod legatus ſaginatur bonis Angliæ, which Legate held his Councell at London, An. Dom. 1237. & 22 H. 3. And for the better finding out Offences which ſhould be redeemed with Money, he with the aſſent of the Biſhops of England there aſſembled, made divers Canons, amongſt which one was Jus jurandi Calumniæ in cauſis eccleſiaſticis cujuſlibet, & de veritate dicendi in ſpiritualibus quoque ut veritas facilius aperiatur & Cauſæ celerius determinentur Statuimus de Cætero præſtari in Regno Angliæ ſecundum Canonicas & legitimas Sanctiones, obtenta in contrarium Conſuetudine non obſtante. &c.

By which Canon, it appears that the Law and Cuſtome of England was againſt this examination of the party Defendant upon his Oath, for it is ſaid Statuimus de Cætero præſtari in Regno Angliæ, ſo that this was a new Law, and took its effect De cætero.

2. Obtenta in contrarium Conſuetudine non obſtante. And this very well agrees with the Regiſter and the ſaid Treatiſe De Regia prohibitione, and the other Authorities, That the Law and Cuſtome of England

was

was, that Lay-people in criminall cauſes, be they Eccleſiaſtical or Temporall, ſhall not be examined upon their Oath (only in cauſes matrimoniall and teſtamentary;) otherwiſe it is of Clerks, as is aforeſaid: And for this, that it appears by the ſaid Cannon it ſelf, that this was againſt the Law and Cuſtom of England, whence it follows that this Cannon ſhall not bind, for that the Law and Cuſtoms of England cannot be changed without an act of Parliament, for this, that the Law and Cuſtom of England is the Inheritance of which he cannot be deprived without his aſſent in Parliament: And it appears in Linwood, cap. jure jurandi, fol 8. 6. That Boniface Biſhop of Canterbury, An. 1272. & 57 H. 3. a little before the death of that King, made this Canon, Statuimus quod Laici de ſubditorum peccatis & exceſſibus corrigendis per prælatos & judices eccleſiaſticos inquiratur ad præſtandum de veritate dicenda ſacramentum per excommunicationis ſententias. Si opus fuerit compellantur impedientes, vero ne hujuſmodi juramentum præſtetur per interdict, eſt excommunicatio ſententia arceantur. In which Cannon, it is to be obſerved, that this extends to Lay-people; For, as appears, the Eccleſiaſticall Judge may examine thoſe of the Clergy upon their Oaths, And note Linwood, cap. jure jurando, fol 6. littera E. ſaith ſo, Hic dicitur cauſa editionis hujus ſtatuti, viz. Prælati Eccleſiaſtici procedebant ad inquirendum de criminibus & exceſſibus ſubditorum ſuorum, & laici (nota hic) ſuffulti poteſtate dominorum temporalium in hujuſmodi inquiſitionibus noluerunt jurare de veritate dicenda.

Note well what the cauſe was, why Lay-people refuſed to be examined for Crimes and Exceſſe.

2. It appears, that the Judges of the Common Law, by their Prohibition did interdict, &c. as it appears by the Regiſter and the other authorities, in the time of Ed. 1. and other Kings, Incroachments were made upon the Subjects which are here called Impedimentes, but now the Cannon ſaith, Impellat.

3. That where by the Law they may examine Lay-people upon their Oath, In Cauſis matrimonialibus & teſtamentariis, Here Boniface makes this Cannon to extend to Peccata & exceſſus, which Cannon was utterly againſt the Law and cuſtome of England. In like manner another was made by him at the ſame time, Linwood cap. de benef. fol. 231. which Cannon being made directly againſt the Judges, who did award proceſſe againſt them, if they did impoſe any pecuniary pain: And prohibites them the Judges without fear of excommunication, the Cannon being againſt Law, prohibites them notwithſtanding this thundring of Excommunication in all ages. And the ſcope and purpoſe of the ſaid Cannon was to perplex the Subjects, and to inrich themſelves by puniſhment pecuniary: And this is declared by act of Parliament made 9 Ed. 2. called Articuli Cleri. Si prælati imponant Pœnam pecuniariam alicui pro peccato, &c. Regia prohibitio locum habet.

Trin. 5. Jacobi.

NOta, the Law ſo regards the Weal-publike, that although that the King ſhal have the Suit ſolely in his name for the redreſſe of it, yet by his pardon he cannot diſcharge the Offender, for this, that it is not only in prejudice of the King, but in damage of the Subjects: for the avoyding of infinite Suits they cannot have private actions, and for that reaſon the Suit is given to the King, not only for himſelf, but alſo for all his Subjects, *Bonum publicum.*

jects, as if a man ought to repair a Bridge, and for default of reparation it falls into decay: In this case the Suit ought to be in the name of the King, and the King is sole party to the Suite, but for the benefit of all his Subjects. And for this, if the King pardon it, yet the Offence remains; And in any Suit in the name of the King, for redresse of it, the Offender ought (notwithstanding the pardon) to make and repair the Bridge for the benefit of the Weal-publick, but peradventure the pardon shall discharge the Fine for the time past: And with this agrees, 37 H. 6. 4. 6. Plow. Com. in Nicols case 487. where the Words of the Law are; If a Bridge or a High-way is repairable by the Subject, and is in decay, the pardon of the King shall not excuse him which ought to do it, for this, that the other Subjects of the King have interest in it. But note, if the pardon in such case shall discharge the Fine, but only for the time before the pardon: But for the time after the pardon, without question the Offender for his default shall be fined and imprisoned, the same Law, and a multo fortiori in case of Depopulation; for this is not only an Offence against the King, but against all the Realm, for by this the Realm is infeebled, idle and dissolute people which are Enemies to the Common-wealth abound: And for this cause Depopulation and diminution of Subjects is a greater nusance and offence to the Weal-publike, then the hinderance of the Subjects in their good and ease passage by any Bridge or High-way: And for this, notwithstanding the pardon of the King, he shall be bound to re-edifie the houses of Husbandry which he hath depopulated, but peradventure for the time before the pardon he shall not be fined, but for the time after without doubt he shall be fined and imprisoned, for the Offence it selfe cannot be pardoned, as in the case of a Bridge or High-way; Quia est malum in se: But this continues as to the Fine & Imprisonment at all times after the Pardon: But the penalty inflicted by the Statute that may be discharged, Quia prohibitum. Vide 3 Ed. 3. tit. Ass. 443. Where an Abbot was bound to repair a Bridge by Prescription, and after the King by his Charter discharged him, which Charter was allowed in a Quo warranto. And after the Abbot was indicted at the Suit of the King, for default of reparation of the said Bridge, and he pleaded the said Charter and allowance: And notwithstanding it was adjudged that he should repair the said Bridge, for this, that although the Suit bee in the name of the King for the Offence yet the King cannot discharge it, for this, that it shall be no prejudice and damage of his Subjects: But when the King chargeth his Subjects for the making of a Bridge, or Cause, or Wall, &c. there the King may discharge in the Pontage, Murage, &c. But when one is bound by Prescription or Tenure, &c. to repair a Bridge, &c. there the King cannot discharge it. And all this appears in the said Book.

Vid. 35. H. 6. 29. per fort escue & 16. Ed. 3. grant 53.

And note, If one be bound to the King in a Recognizance for to keep the Peace against one, and other the Liege people of the King; in this case the King, before the Peace broken cannot pardon and release the Recognizance, as it is agreed in 11 H. 4. 43. 37. H. 6. 4. 1 H. 7. 10. And the reason is, although the Recognizance be made to the King solely, yet inasmuch as this is made for the benefit and safety of the Subjects of the King, in such case it cannot be discharged.

Note, no license can be made to do any thing that is Malum in se, but Malum prohibitum, 11 H. 7. 11. 3 H. 7. 39 H 6. 39.

Trin.

Trin. 5. Jacobi.

Commiſſions.

NOte, Commiſſions in Engliſh under the great Seal were directed to divers Commiſſioners within the Counties of Bedford, Bucks, Huntington, Northampton, Leiceſter, and Warwick, to enquire of divers Articles annexed to it: And the articles were alſo in Engliſh, to inquire of Depopulation of Houſes, converting of arable Land into Paſture, &c. But the Commiſſioners ſhould not have any power to heare and determine the ſaid Offences, but only to enquire of them: And by colour of the ſaid Commiſſions, the ſaid Commiſſioners took many Preſentments in Engliſh, and did return them into the Chancery, and after, Scil. Trin. 5. Jac. it was reſolved by the two chief Juſtices, and by Walſmley, Fenner, Yelverton, Williams, Snigg, Altham, and Foſter, that the ſaid Commiſſions were againſt Law for three cauſes;

1. For this, that they were in Engliſh.

2. For that the Offences enquirable were not certain within the Commiſſion it ſelfe, but in a Schedule annexed to it.

3. For this, that it was only to enquire, which is againſt Law, for by this a man may be unjuſtly accuſed by Perjury, and he ſhall not have any remedy, for this, that it is not within the Statute of 5 Eliz. &c. Alſo the party may be defamed, and ſhall not have any traverſe to it, ſuch a Commiſſion, may be only to inquire of Treaſon, Felony granted, &c. And no ſuch Commiſſon ever was ſeen, to enquire only.

At the common Law, Aſſiſes were not taken but before Juſtices in Eyre (who ſit virtute Brevis, every ſeventh year, vide Britton fol. 1. and Bracton, lib. 5. & 11.) or in the Common Pleas: And this being a great moleſtation and trouble to the Recognitors of Aſſiſe, which Writ for the moſt part was in uſe, for the eaſe of the Country, and expedition of Juſtice; it was provided by Magna Charta, cap 12. Quod recognitiones de nova diſſeſina, & de mor. de anceſter, non capiuntur niſi in ſuis Comitatibus, & hoc modo: Nos, vel (ſi extra regnum fuerimus) Capitales Juſticiarii noſtri mittent juſticiarios noſtros per unumquem que Comitatum ſemel in anno, qui, &c. capiant in Comitatibus illis Aſſiſas predictas. And after, was the Statute of Weſtminſter 2. c. 30. made, and by this it is provided, Quod aſſignentur duo Juſticarii jurati, coram quibus & non aliis capiantur aſſiſa, &c. ad plus per annum. By which act Juſtices of Niſi prius were conſtituted of other Pleas, as well of one Bench as the other, Coram quibus Juſticiariis & ſocietate (viz,) Coram duobus Juſticiariis vel uno milite, &c. And by the ſame act the Juſtices of Niſi prius have power to give Judgment &c. in Aſſiſes of Darrain preſentment, and Quare impedit, then came the Statute of 21 Ed. 3. De Finibus, cap. 4. and provided Quod inquiſitiones & recognitiones capiantur tempore vacationis, generally before aliquo Juſticiario de utroque banco, coram quibus placitum deduct. fuerit aſſociat. ſibi, &c. And after by the Statute of York, cap. 3. It is provided, that in plea of Land the Niſi prius ſhall be taken before one of the Juſtices, where the Plea, &c. and Chapter 4. That no other Pleas moved by Attachment, or diſtreſſe ſhall be taken before any Juſtice, either of the one Bench or the other generally, be the Plea before them or not, &c. by the Statute 14 Ed. 3. cap. 15. Niſi prius may be taken in any Plea, reall or perſonall before two, ſo that the one be a Juſtice of the one Bench, or a chief Juſtice, or a Serjeant ſworn.

By

By the Statute De finibus, cap. 3. Juſticiarii ad aſſiſas capiendos aſſignati deliberant Gaolas in Comitatibus illis ſive infra libertates quam extra de priſonariis quibuscunque, Vide le recital del Statute of 28 Ed. 1. de appellatis, which recites the Statute de felonia, &c. but not that Felony includes Treſpaſſe in ancient time, vide Stamf. 57: The Statute of 3 H. 3. cap. 7. gives power to Juſtices of Aſſiſe to hear and determine Treaſon, concerning falſe money: The Statute of 14 H. 6. cap. 1. provides that Juſtices of Niſi prius, have power in all the Caſes of Felony and Treaſon to give their Judgment as well where the party is acquitted of the Felony or Treaſon, as where he is attaint, and to award execution, &c.

The Statute of 28 Ed. 1. De appellatis gives power to Juſtices of Aſſiſe to try the appeals of approvers.

Juſtices of Aſſiſe by the Statute 34. & 35. H 8. cap. 14. May write to the Clerk of the Crown De banco Regis, to certifie the firſt conviction in their own name; but where Juſtices of one County or Circuit write to other to certifie the attainder of a Principle, the beſt form is in the name of the King, 2, & 3. Ed. 6. cap. 24.

By the Statute De Articulis ſuper chartas, c. 10. & 4 Ed. 3. c. 11. & 7 R. 2. Juſtices of Aſſiſe may hear and determine Conſpiracies, falſe informations, and Mal-procurers of Inqueſts and Juries to any Plaint, without Writ and without delay, and of Confederacies, and Champerties, and Maintainers, Bearers, and Alliances by Bond, &c.

By the Statute of Northampton, 2 Ed. 3. cap. 3. Juſtices of Aſſiſe have power to hear and determine the Statute concerning Armor; alſo to puniſh the Juſtices of Peace, and others, who have not done their Office in ſuch like caſes, &c.

Juſtices of Aſſiſe ought twice in the year to proclaim the Statute, 32 H. 8. and other Statutes againſt unlawfull Maintenance, Champerty, Imbracery, and unlawfull Retainers.

By the 3 H. 7. cap. 1. Juſtices of Aſſiſe take Bail of him who is acquit of Murther within the year, to anſwer the appeal of the party.

By 33 H. 8. Juſtices of Aſſiſe cauſe the Statute againſt unlawfull Games, to be proclaimed in their Circuit.

Juſtices of Aſſiſe make execution of the Statute, 13 H. 4. cap. 7. of Ryots made in their preſence, upon pain of a hundred pound, and by 2 H. 5. cap 8. Commiſſion ſhall be awarded to enquire of the default of Juſtices of Aſſiſe and of the Peace.

By the Statute of Weſtminſter 2. cap. 37. & 2 Ed 3. cap. 5. Juſtices of Aſſiſe ought to enquire of return or not returne of Sheriffs.

Juſtices of Aſſiſe to enquire of all points of the Statute of 23 H. 6. cap. 10. concerning Sheriffs, under-Sheriffs and their Clerks, Coroners, Stewards of Franchiſes, Bayliffs and Guardians of Priſons, for their extortion, and for delivering of them who are not baylable, and for detaining thoſe who ought to be bayled, 2 Mariæ Dyer 99. Juſtices of Aſſiſe held plea in appeal of Murther, by W. 2. & 3. H. 7. and of Robbery by Commiſſion for Gaol-delivery.

23 Ed. 3. cap. Juſtices of Aſſiſe may enquire of default, &c. of puniſhment of Victuallers, &c. who ſell at unreaſonable prices.

Note, Juſtices of Oyer and Terminer cannot by this authority enquire but of ſuch, who are indicted before themſelves, for their Commiſſion is, Ad inquirendum, audiendum & terminandum: But Juſtices of Gaol-delivery may arraign a Priſoner indicted before others, the words of their Commiſſion are, Ad Gaolas, Gaolam de B. de priſonaribus in ea exiſtentibus hac vice deliberandum, ſecundum leges, &c. Brook Title Commiſſion, 3 Mar.

3 Mar. 24.4. Ed.3.c.2. That Justices of Gaol-delivery, deliver Prisoners indicted before the Guardians of the Peace. And by the Statute of 1 Ed.6.cap.7. New Commissioners of Gaol-delivery; But this doth not extend to Indictments, or conviction before the Commissioners of Oyer and Terminer: And the reason of this, is for this, that the indictments and proceedings before Justices of Oyer and Terminer, after the Oyer determined, ought to remain in the Kings Bench: And the Records before Justices of Gaol-delivery, remain with the Custos Rotulorum, vide Brook, Title Commission, 12, 38 H.8. Title Oyer and Terminer, 44 Ed.3.31.

Note, upon conference between Popham chief Justice, and my self, upon a judgement given lately in the Exchequer, concerning the imposition of Currants: And upon considerations of our Books, and of Statutes to this purpose: It appeared to us that the Rule of the Common Law is the Register, Title Ad quod Dampnum, and F.N.B. 222. a quod patria magis solito non oneretur seu gravetur; Also there is another Rule, that the King may charge his people or this Realme without speciall assent of the Commons, to a thing which may be of profit to the Common people, but not to their charge; As is held in the 13 of H. 4. 16. Et Statutum de Tallagio non concedendo, Nullum Tallagium, seu Auxilium per nos, seu heredes nostros ponatur seu levetur absque voluntate & assensu Parliamenti. Et Magna Charta, cap.30. Omnes Mercatores (Nisi publice antea Prohibiti fuerint) habeant Salvum & securum conductum abire de Anglia & venire in Angliam, & morari & ire per Angliam, tam per terram quam per aquam, ad emendum & vendendum sine omnibus malis Toluetis per antiquas & rectas consuetudines, præterquam in Tempore Guerræ, which Statute hath been confirmed more then thirty times by severall acts of Parliament, vide le Statute. 25 Ed.1.3 Ed.1. in turri. 9 Ed. 3. cap. 1, and 2.14 Ed.3.2.25 Ed.3.cap.2, &c. The effect of which is, that every Merchant of this Realm, or other, may freely buy, sell, and pass the Sea with all their Merchandises, paying the Customs of ancient time used. Queen Mary put an imposition upon Cloaths, which the 1 Eliz. Dyer. 165. was moved and not resolved, vid. 31. H. 8 Dyer fol.43, and 1 Eliz. 165. Magna Custuma & parva Custuma, vide 9 H.6.12, and 35. And note there the saying of Babington. Note the 1 Eliz. Dyer 165. there was Antiqua sive magna Custuma at the Common Law, scil. for Wools, Wolfels, and Leather, and this was equall to strangers as Denizens, And in the time of Ed.1. a Merchant stranger grants over the said Customs 3s. 4d. which is called Nova seu parva Custuma.

Customs, Subsidies, and Impositions.

Upon all which and divers Records which we had seene, it appeared to us, that the King cannot at his pleasure put any imposition upon any Merchandise to be imported to this Kingdome, or exported, unlesse it be for advancement of Trade and Traffick, which is the life of every Iland, Pro bono publico. As if in forraign parts any imposition is put upon the Merchandizes of our Merchants, Non pro bono publico, and for to make equality, for the purpose to advance Trade and Traffick, the King may put an imposition upon their Merchandizes, for this is not against any of the Statutes which were made for advancement of Merchandize, or of the Statute of Magna Charta. cap. 30. which is, Si aliqui Mercatores, de terra contra nos guerrina inveniantur in terra nostra in principio guerræ attachientur, &c. Quo modo mercatores terræ nostræ tractantur qui nunc inveniantur in terra ille, contra nos guerrina: Et si nostri salvi sunt ibi, illi salvi sunt in terra nostra; For the end of all such restraints is, Salus populi: And so in the case of Currants, which was now lately adjudged in

the Exchequer: Alſo in the caſe of Cuſtomer Smith, which was adjudged in the Exchequer, in the Raign of Queen Eliz. both the Impoſitions were impoſed, upon the ſaid reaſon to make equality; for this was the truth of both caſes (Scil.) The advancement of Trade and Traffick, and for this cauſe ſuch Impoſitions were lawfull.

And it was cleerly reſolved by us, that ſuch Impoſition ſo put, cannot be demiſed or granted to any ſubject, for this, that it is to augment and decreaſe, or be quite taken away upon juſt occaſion for advancement of Merchandize. And this was one of the reaſons in Cuſtomer Smiths Caſe, that it could not be demiſed; alſo it was aſſeſſed after the Demiſe.

And although that the King may prohibite any perſon in ſome caſes with ſome Commodities to paſs out of the Realm, yet this cannot be where the end is private, but where the end is publick, Viz. To reſtrain the perſon, for this, that, Quam plurima nobis & Coronæ noſtræ prejudicialia in partibus exteris proſequi intendit, and to reſtrain any Merchandizes either in time of Dearth, or in time of War, for Neceſſitas eſt lex temporis.

It appeared unto us alſo, that at the common Law no Cuſtome was paid, but only for Wools, Wool-fels, and Leather, which is called, in Magna Charta, Recta conſuetudo, and all others are there called Mala tolneta, which in the Statute De Tallagio non concedendo, is called Male. And at the beginning of the Raign of Kings, it hath for a long time been uſed, by authority and conſent of Parliament, to grant to the King certain Subſidies of Tunnage and Poundage, for tearm of his life, which began in ſuch forme, 2. and 3. H. 5. in the 31 H. 6. cap. 8. and 12 Ed. 4. cap. 3. For the Defence of the Realm, and maintenance of certain Wars, by Act of Parliament, which proves, that the King by his own power cannot impoſe it, but by conſent of Parliament; but ſuch ſubſidy of Tunnage and Poundage might be granted by the King ſo long as he lived, for this, that this is limited and given to the King in certain: But an impoſition put for equality, as hath been ſaid, hath not any certain continuance, but is to be augmented, diminiſhed, or taken away, for the benefit of the Common-wealth: And for that cauſe it cannot be demiſed, vide 31 H. 8. Dyer 43. 1 Mar. D. 92. 1 Eliz. D. 165. and 3. P. & M. D. 128. 12 Eliz. D. 296. 23. Eliz. D. 375. 45. Ed. 3. cap. 4. 27 Aſſ. pl. 44. Regiſter 192, &c.

Vide M. Ch. cap. 30. they are called Conſuetudines & per vocabulum artis they are called Cuſtuma, vide le Stat. 51 H. 3. Title Exchequer in Raſtall: It appears that there were ancient Cuſtomes, and thoſe were for Wools, Wool-fels, and Leather, vide le Statute, 9 Ed. 3. cap. 2. That all Charters, and Letters Patents made againſt free Trade and Traffick, made, or to be made, are void.

Vide Forteſc. in his Comment of the Lawes of England, cap. 3. 6. fol. 43. Neque Lex per ſe vel per miniſtros ſuos Tallagia, ſubſidia, aut quævis alia onera imponit Legeis ſuis, aut leges eorum mutat, vel novos condit ſine conceſſione & aſſenſu totius Regni ſui in Parliamento ſuo expreſſo, &c. vid. fol. 13. cap. 9.

And note for the benefit of the Subject, the King may make an Impoſition or Toll within the Realme, to repaire High-waves, Bridges, and to make Walls for defence: But then the Summe impoſed ought to be proportionable to the benefit: And this appeares the 13 Henry 4. 16. See, the Impoſition for equality ought to be for the publicke good, ſee the Charter, 31. Ed. 1. which is called Charta mercatoria ex Rot. mercator. an. 31. Ed. 1. n. 42. Patents 3 Ed. 1. n. 1, and 9. de tacco lanæ dimidium marcæ; laſta coriorum, 1 Mark, &c. Fines. 3. Ed. 1. n. 24. intus & non in dorſo, vide Rot. Parliament. an. 13. Ed. 3. No new Inhanſment of Cuſtomes without com-

mon

mon consent: And in 22 Ed. 3. n. 8. against new Customes and Impositions, and that Merchants may freely pass, &c. And in the Parliament. an. 8. H. 6. n. 29. Amongst the new Impositions granted by H. 5. upon Merchandizes comming to Burdeaux: And Parliament 28 H. 6. n. 35. the Duke of Somerset accused for causing the King to grant unto Sir Pierce Bracy an Imposition of Wines.

Par. 9. R. 2. n. 30. against a Patent made to the Lieutenant of the Tower, by colour of which he took Custome of Wine, Dysters, and other Victuals to be sold.

29 Ed. 3. 11. n. Ex Rot Parliamenti, Subsidy of Wools granted for six years, so as during the same time no other aid or imposition be laid upon the Commons.

Parliament. 5. Ed. 3. n. 17, 18, 19. against new Impositions upon Staple Commodities, Parl. 22 Ed. 3. n. 31. against alnage of Worsteds, 5 Ed. 3. n. 163. against all new Impositions, and 5 Ed. 3. n. 191. 38. Ed. 3. n. 26. Rot Parl. against unreasonable Impositions.

Parl. 7 R. 2. n. 35, 36. 9 R. 2. n. 30. No Inquisitions or Taxes without consent of Parliament.

Note 2 R. 2. Parl. apud Gloucestriam, act 25. Subsidy only for defensive wars, not for invasive, 1 R. 2. Parl accord, 1 R. 3. against Benevolence, Vide Claus. 4. Ed. 3. n. 22. bis.

IN the case in the Star-chamber, between Edwards a Physitian Plaintif, and Wooton Doctor in Physick Defendant. Libels. Star-chamber.

The Case was, That Doctor Wooton writ to Edmunds an infamous, malicious, scandalous, obscæn Letter, to which he subscribed his name; And this he sealed and directed, To this loving Friend Mr. Edward Speed this: And after the said Doctor published and dispersed to others a great number of Copies of the said lettet.

And it was resolved by the Lord Chancellor Egerton, the two chief Justices, et per totam Curiam, that this was a subtle and dangerous kind of Libell; For inasmuch as the writing of a private Letter to another, without any other publication, the party to whom it is directed cannot have an Action Sur le case, for this, that no action lyes; but when it is published to others to the scandall of the Plaintiff, as it hath been often times adjudged, action lyeth.

The Doctor thought that this could not be punished in any manner; But it was resolved, that the said infamous Letter, which in Law is a Libell, shall be punished (allthough it was solely writ to the Plantiff without any other publication) in the Star-Chamber, for that it is an Offence to the King, and is a great motive to revenge, and tends to the breaking of the Peace and great mischief: And for that reason it was necessary, that it should be punished either by Indictment, or in the Star-Chamber, to prevent such occasions of mischief. But in the case at the Bar, the dispersing of Copies of it, or the publication of the effect of it, aggravates the Offence, and makes it a new Offence: For, for that also the party may have an Action sur le Case.

Note, that by the Civill Law, if any person hath disabled himself to bear any Office, or for any other purpose made a Libell against himself, he shall be punished for it. And so it seems to me, he should be in the Star-Chamber: for this is an Offence to the King and the Common-wealth: And without question, although that the Doctor subscribed his name to the said Letter, yet the said Letter importing the scandalous matter of a Libell, is in the Law a Libell.

Nota

Nota, the Law of the Lydians is, that he who slanders another, shall be let blood in the Tongue, and he who heares it and assents to it, in the Eare, &c.

Mich. 5. Jac.

Reservation.

INter Johannem Wooton quer. & Johannem Edwin Defendentem. In Replevin the Defendant avowed, and the Plaintiff demurred; and the Case was thus.

William Hawes was seised in Fee of a Messuage, and fifty five acres of Land, five acres of Meadow, and six acres of Pasture in Fromanton, in the County of Hereford: And 27. Junij. 28. H. 8. by Indenture demised the Tenement aforesaid, to Nicholas Traheren, for seventy nine years, Reddendo inde annuatim prefato Gulielmo Hawes, & assignatis suis 26 s. 8 d. at the Feasts of the Annunciation, and St. Michael by even and equall portions: And after the Lessor dyed, and the Reversion descended to William his Son, under whom the said John Edwin claimed.

And the sole point in this case was, If the Rent reserved in this case shall go to the Heir, or shall be determined by the death of the Lessor, for if the Lessor had reserved the Rent to him without more, this shall determine by the death of the Lessor: and the addition of these words (And his Assignes) shall not enlarge the reservation, for if the Lessor had assigned the reversion over, yet the Rent shall determine by his death, for the Assignes cannot have the Rent longer then the Lessor himself should have it; And the Lessor himself hath it but for tearm of his own life, vide 18 Ed. 3. title Ass. 86. 10 Ed. 4. 18. 27 H. 8. 19. per Audley & vide Hill. 33. Eliz. Rot. 1341. In this Court in a Replevin, inter Richmond & Butcher, where the case was, that Butcher avowed for a rent as Heir to his Father, upon a Demisse made by his Father of certain Lands for one and twenty years, by these words, Reddendo & solvendo proinde durante predicto termino 21. annorum prefato (Patri) Executoribus & assignatis suis 10 l. legalis monetæ angliæ, &c. ad festa, &c. And it was adjudged, that by this reservation the Heir should not have the Rent, for that the reservation was made to the Father, his Executors and Assignes, and not to his Heirs, &c.

Mich. 5. Jac.

Corone, Buggary.

Nota, Bugrone Italice, *is a Buggerer, and* Buggerare *is to* buggar, *so Buggary comme.h of the Italian Word.*

THe Letter of the Statute of the 25 H. 8. cap. 6. If any person shall commit the detestable sin of Buggary with Man-kind, or Beast, &c. it is Felony, which act being repealed by the Statute, 1 Mar. is revived and made perpetuall by 5 Eliz. cap. 17. And he shall lose his Clergy.

It appears by the ancient Authorities of Law, that this was Felony; but they vary in the punishment, for Brit. cap. 9. saith, that, Soceres, Sodomers & Hereticques shall be burnt, F. N. B. 269. a. agrees with it: But Flet. lib. 1. cap. 35. Pecorantes & Sodomitæ terra vivi ceu fodiantur. But in the ancient Booke called

called the Mirror of Juſtice vouched in Plow. Com. in Fogoſſes caſe, the Crime is more high, for there it is called Crimen læſæ Majeſtatis, a ſin horrible, committed againſt the King of heaven: And this is either againſt the King Celeſtiall, or Terreſtriall in three manners; by Hereſie, by Buggary, by Sodomy. Note, that Sodomy is with Man-kind, & it is Felony by the ſtatute of 25 H. 8. & therefore the judgement for felony doth now belong to this offence, viz. to be hanged by the neck till he be dead. To make that Offence, Oportet rem penetrare, & ſemen naturæ emittere, & effundere, for the Indictment is Contra ordinationem Creatoris & naturæ ordinem rem habuit veneream, dictumque puerum carnaliter cognovit. Every of which (rem habuit, & carnaliter cognovit) imply penetration and emiſſion of ſeed: And ſo it was held in the caſe of Stafford, who was attaint in the Kings Bench and executed. Pæderaſtes, amator puerorum, whereof the Greek word is, Παιδεραστία; Buggary with Boyes vide Rot. Parliament 50. Ed. 3. num. 58. complained in Parliament, that a Lumbard did commit the ſin that was not to be named: So in Rape, there ought to be penetration and emiſſion of Seed, vide Stamford. fol. 44. Which Statute makes it Felony, he who procures, &c. or receives the Offender, &c. is acceſſary.

The words of the Statute of Weſt. 1. cap. 34. If a man raviſh a woman, 11 H. 4, 18. If one aid another to commit Rape, and if he be preſent, he is principal in the Buggary, vide Leviticus 18, 22. & cap. 10. 13. 1. Cor. 6.

Premunire. Vid. 15 H. 7. 9 Premunire was at the Common Law

NOte, in the Book of Doctor Coſines, intituled, An Anſwer, &c. to the Abſtract, and publiſhed 1584. And a Pamphlet now lately publiſhed by Doctor Ridley, they would obtrude upon the World, That foraſmuch as that now by the act 10 Eliz. cap 1. all Spirituall and Eccleſiaſticall power within this Realm is annexed to the Crown, and the Law by which they determine cauſes, which belongs to their Cognizance, is the Eccleſiaſticall Law of the King: That for that cauſe no Præmunire lies againſt any Spirituall Judg for any Cauſe whatſoever. And ſome other of their Profeſſion have ſome other reaſons to confirm it.

1. That when the Statute of Premunire was made, Viz. in the Raign of the Kings, Ed. 3. & R. 2. then the Pope uſurped Eccleſiaſticall Juriſdiction, although that De jure it belonged to the King. And therefore foraſmuch as the King is as well De facto, as De jure, ſupream head of all, as well Eccleſiaſticall as Temporall; now the Cauſe being changed, the Law is changed alſo.

2. The concluſion of the Writ of Præmunire is in Domini Regis contemptum & præjudicium, & dictæ Coronæ & dignitatum ſuarum læſionem & exhæredationem manifeſtam, & contra formam ſtatuti, &c. Which proves that the Juriſdictions ſhall be now ſevered and united to the Crown; For that which is united to, and derived from the Crown, cannot be ſaid contra Coronam & dignitatem Regis.

3. The Court of high Commiſſion is the Court of the King, and is by force of an act of Parliament, and Letters Patents of the King: And for this, although it may be ſaid, that the Conſiſtory Courts are Curiæ epiſcoporum, yet the Court by force of high Commiſſion is the Court of the King: And for that reaſon their proceedings ſhall not be ſubject to Præmunire.

4. This new Court is erected by Act of Parliament, and Letters Patents of the King: And for this, where the Statute of R. 2. ſpeaks De Curia Romana ſeu alibi, &c, This (alibi) cannot extend to a Court erected by Parliament, An: 10. Reg: Eliz.

But to theſe Objections; it was anſwered and reſolved by divers Juſti-

ces in this very Term, that witho. t queſtion the Statutes 27 Ed. 3. 16. R. 2. &c. De premunire, are yet in force: And all ſuch proceedings, by colour of Eccleſiaſticall Law before any Eccleſiaſticall Judges who were in danger of Premunire, before the ſaid act 1 Eliz. are now in caſe of Præmunire after the ſaid act; be it before the Commiſſioners by force of high Commiſſion, or before Biſhops or other Eccleſiaſticall Judges: For the ſaid acts of Præmunire are not repealed by the ſaid act, 1 Eliz.

And as to the firſt and ſecond Objections, it was anſwered, that true it is, that the Crown of England hath as well Eccleſiaſticall as Temporall Juriſdiction, De jure annexed to it, as appears by the Reſolution in Cawdries caſe, from age to age: And although this was De jure, yet when the Pope became ſo potent and powerfull, he did uſurp upon the Kings Eccleſiaſticall Juriſdiction within this Realm; but this was but meer uſurpation (for the King cannot be put out of the poſſeſſion of any thing which belongs to his Crown:) And for this reaſon all the Kings of this Realm Totis viribus proinde, for the eſtabliſhment of their temporall Law, by which they inherit the Crown, and by which they govern their Subjects in Peace, and puniſh thoſe who are rebellious, or who commit great Offences againſt them and their Crown: And they were alwaies jealous leaſt any part or point of their temporall Law ſhould be incroached upon: And for this, if the Eccleſiaſticall Law uſurp any thing upon the temporall Law, this was ſeverely puniſhed: And the Offender eſteemed and adjudged an Enemy to the King by the ancient Statutes; and every one might have killed him before the Statute 5 Eliz. and this is the reaſon for why: although both Juriſdictions belong to the Crown, yet in almuch as the Crown it ſelfe is directed deſcendable by the Common Law, and all Treaſon againſt the Crown puniſhed by this Law; for this cauſe, when the Eccleſiaſticall Judge uſurps upon the Common Law, it is ſaid Contra Coronam & dignitatem &c. And all the Prohibitions directed to the high Commiſſioners from year to year, from the time of the making of the ſaid Statute 1 Eliz. doth conclude, Contra Coronam & dignitatem Regiam.

For as it was reſolved by all the Juſtices, Paſch. 4. Jac. Reg. eſt contra Coronam & dignitatem Regiam, when any Eccleſiaſticall Judge doth uſurp upon the temporall Law, becauſe, as in all thoſe Writs it appeareth, the intereſt or cauſe of the Subject is drawn ad aliud examen, that is, when the Subject ought to have his cauſe ended by the Common Law, whereunto by birth-right he is inheritable, he is drawn in aliud examen (viz.) to be decided and determined by the Eccleſiaſticall Law: And this is truly ſaid Contra Coronam & dignitatem Regiam. And this appears by all the Prohibitions (which are infinite) which have been directed to the high Commiſſioners and others after the ſaid act 1 Eliz. A fortiori, he who offends in a Præmunire ſhall be ſaid to offend Contra Coronam & dignitatem regiam: And this in effect anſwers to all the aforeſaid Objections; but yet other particular anſwers ſhall be given to every of them.

As to the third, although the Court by force of high Commiſſion is the Court of the King, yet their proceedings are Eccleſiaſticall: And for this, if they uſurp upon the Temporall Law, this is the ſame Offence which was before the ſaid act 10 Eliz. For this was the end of all the ancient acts, that the Temporall Law ſhall not in any manner be emblemiſhed by any Eccleſiaſticall proceedings.

As to the fourth, although it be a new Court, yet the ancient Statutes extend to it within this word Alibi, and divers new Biſhopricks were erected in the time of H. 8. And yet there was never any queſtion, but that the

the ancient Acts of Præmunire extended to them.

But to answer to all the Objections afore said, founded upon the said Statute of 1 Eliz out of the words and meaning of the same act; For whereas the act 1 Eliz. repealed the Statute 1 & 2 P. M. 8. There is an expresse Proviso in the said act 1 Eliz, that that shall not extend to repeale any clause, matter, or sentence contained or specified in the 1, & 2. P. M. which in any sort toucheth or concerneth any matter or cause of Præmunire: But that all of that which doth touch or concern any matter of Præmunire, shall stand in force and effect: And the clause of 1. & 2. P. M. which concerns matter of Premunire, is such, every person who by any processe out of any Ecclesiasticall Court of the Realm, or out of it, or by pretence of any Spirituall Jurisdicition, or otherwise, contrary to the Lawes of the Land, unquiet or molest any man for any thing, parcell of the possession of any Religious house, shall incurre the danger of the act of Premunire, An. 16. R. 2. which proves that as well the act 1, & 2. P. M. as the act 1 Eliz. which creates the high Commission Court, which refers to the act of 1, & 2. P. M. intends by expresse words, that the act 16 R, 2, of Præmunire shall stand in force, Also the act of 1 Eliz. revives the act of 25 H. 8. cap 10. which makes a Premunire in a Dean and Chapter &c. for for not electing, nor certifying, or not admitting of any Bishop elected: by which it is directly proved, that the act 1 Eliz. never intended to take away the offence of Præmunire, but expressly provided for it, as appears by that which hath been said.

But then we are to note in what cases a Præmunire lies, in what not. Prima Regula

And for this that it is so penall, it is necessary that it should be explained and made known.

In all Cases, when the cause originally belongs to the Cognizance of the Ecclesiasticall Court, and Suit is prosecuted there, in the same nature as the Cognizance belongs to them (although in truth the cause, all circumstances being disclosed, belongs to the Court of the King, and to be determined by the Common Law) yet no Præmunire lies in that case, but a Prohibition. As if Tythes are severed from the nine parts, and are carried away: if the Parson sue for the subtraction of these Tythes in the Spirituall Court, this is not in the case of Præmunire; for it may be that the Plaintiff did not know that they were severed from the nine parts, nor that they were carried away; Nor may the Ecclesiasticall Judge know any thing of it: And although that the Defendant plead this, yet the Ecclesiastical Court may proceed to try the truth of it without danger, vide 10 H. 4. 2. according with this opinion; so if a Parson sue for Tithes of Wood, surmising that they were Sylvæ cæduæ, under the age of twenty years, whereas in truth they were above the age of twenty years (In which case by the Statute of 45 Ed. 3. Tythes ought not to be paid:) yet a Prohibition lyeth and no Præmunire. Regula Prima

But although that the cause originally may appertain to that Cognizance of the Ecclesiasticall Judge, yet if he sue for it in the nature of a Suit, which doth not belong to the Ecclesiasticall Court, but to the Common Law, there a Præmunire lyeth: as in the case put before: If the Parson after the severing of Tythes, will in any Ecclesiasticall Court within this Realm, sue for carrying away his Tythes severed from the 9. parts, which action by matter apparent to the Ecclesiasticall Court, appertains to the Common Law; In such both the Actor and the Judge incurs the danger of a Præmunire: And so was it adjudged in 17 H. 8. as Spilman reports it: One Turbervile sued a Præmunire against a Parson, who by citation convened him into the Ecclesiasticall Court within this Realm, Regula secunda.

and

and there Libell'd againſt him for taking of Tythes, which were ſevered from the nine parts, and the Parſon was condemned and had Judgment that he ſhould be out of the protection of the King, and forfeit all his Lands, Goods, and Chattels, and his body to perpetuall Impriſonment, and damages to the party. So if a Mortuary be delivered to a Parſon, and after the party re-take it, if the Parſon ſue for this as for a Mortuary to him delivered and carried away, he is in caſe of Præmunire; but after the repriſall, if he ſue for it as Mortuary not executed, in nature of a Suit, which belongs to Court Chriſtian, upon the truth of the caſe there is cauſe of Prohibition, and no Præmunire lies, vide 10 H. 4. 2. So the caſe which hath been put of ſuit for tythes of Wood, if the Parſon ſue for tythes of wood above 20. years growth, ſo that it appears by the Libell, that the Cognizance of this caſe doth not belong to Court Chriſtian (viz.) to the Court of the Archbiſhop of Canterbury, the Præmunire lies, as you may ſee in the Book of Entries, tit. Diſmes, fol. 221. But the tit. Prohibition, fol. 449. Diviſione Diſmes, pl. 2. 3, 4, 5. & 6. if the Suit be Pro ſylva cædua, &c. ſo that as the Suit is framed the Cognizance belongs to Court Chriſtian, although that the truth be otherwiſe, there a Prohibition lies, and no Præmunire. For when the cauſe originally belongs to the Cognizance of the Eccleſiaſticall Court, although that hold plea of any incident to it, which belongs to the Common Law, there Prohibition and not Præmunire.

Regula tertia. When the cauſe originally belongs to the cognizance of the common Law, and not to the Eccleſiaſticall Court, there although they libell for it according to the courſe of the Eccleſiaſticall Law, yet the Præmunire lyeth, for this, that this draws the cauſe which is determinable at the common Law, Ad aliud examen, viz. to be decided by the Civill or Eccleſiaſticall Law; and ſo deprives the Subject of the benefit of the common Law, which is his birth-right: And with this agrees the Book of Entries, Title Premunire, fol. 229. b. & 430. a. where it is put for a Rule. Quod Placita, Querelæ, & poſſeſſiones terrarum & tenementorum tranſgr. debitorum & aliorum conſimilium infra Regnum Angliæ illat. ad Dominum Regem ad Regalem Coronam & dignitates ſuas ſpecialiter, & non ad forum Eccleſiaſticum, pertinent. Quidam I. R. &c. machinans Dominum Regem & Coronam & dignitates ſuas exhæredare, & cognitionem quæ ad Curiam Domini Regis pertinent, ad aliud examen infra Regnum ſuum Angliæ in Curiam Chriſtianitatis coram A. W. Official, &c. trahere &c. quendam articulum ad proſequendum ipſum R. in eadem Curia Chriſtianitatis coram præfato Officiali pro debito 20 l. & ipſum R. in eadem Curia præfato I. A. inde reſponſum citari, &c. So that if the originall cauſe be temporall, although that they proceed by Citation, Libell, &c. in Eccleſiaſticall manner, yet this is in danger of Præmunire: And the reaſon of this Offence is expreſſed in the Writ, for this, that he endeavours to draw Cognitionem quæ ad Curiam Domini regis pertinet, ad aliud examen, which is as much as to ſay, that the Debt, the Cognizance whereof belongs to the Court of the King, and to be determined by the common Law, he intends by the Originall Suit to draw it to be determined by the Eccleſiaſticall Law.

And note, in the indictment of Præmunire againſt Cardinall Wolſey, Mich 21 H. 8. it is ſaid, Quod prædictus Cardinalis & intend: finaliter antiquiſſimas Angliæ legis penitus ſubvertere & enervare, univerſumque hoc Regnum Angliæ & ejuſdem Angliæ populum, legibus imperialibus vulgo dictis legibus Civilibus & eorum legum Canonibus in perpetuum ſubjugare

&

& ſubjicere, &c. and this is included within theſe words, Ad aliud examen trahere, viz. to decide that by the Civill and Eccleſiaſticall Lawes, which is determinable by the common Law: And upon this was a notable caſe in Hil. an. 25 H. 8. the caſe of Nick Biſhop of Norwich, againſt whom, he then being in the cuſtody of the Marſhalſey, the Kings Attorney preferred a Bill of Præmunire: And the matter of the Præmunire was ſuch. Within Thetford in the County of Norfolk hath been De tempore cujus, &c. ſuch cuſtome, that all Eccleſiaſticall cauſes ariſing within that Town, ſhould be determined before the Dean of the ſame Town, who hath within it peculiar Juriſdiction; and that none in the ſame Town ſhall be drawn in plea in any other Court Chriſtian for Eccleſiaſticall cauſes, unleſſe before the ſame Dean: And if any be againſt the ſaid Cuſtome drawn in Suit before any other Eccleſiaſticall Judge, and this be preſented before the Major of the ſame Town, that ſuch party ſhall forfeit 6 s. 8 d. And that an inhabitant of Thetford ſued in the Conſiſtory Court of the ſaid Biſhop, at Norwich for an Eccleſiaſticall cauſe ariſing within the ſaid Town of Thetford, and this was preſented before the Major of Thetford according to the Cuſtome, for which he forfeited 6 s. 8 d. the ſaid Biſhop cited the ſaid Major to appear before him at his houſe in Hoxin, in Suffolk, generally Pro ſalute animæ, and upon appearance libelled, Per parole upon all the matter, and enjoyned him upon pain of Excommunication to adnull the ſaid Preſentment before a day: And upon a Præmunire brought for this matter the ſaid Biſhop had Councell learned aſſigned him; And they objected, that as well the ſaid Preſentment as the ſaid Cuſtome were for divers cauſes void, and therefore it cannot be ſaid, Contra coronam & dignitatem Regiam, nor hath the Biſhop drawn the party Ad aliud examen, for it ought not to be examined in any Court.

2. They objected, that the Court of the Biſhop was not intended within the act of 16 R. 2. 32. but In Curia Romana aut alibi, and this alibi ought not to be intended out of the Realm, but it was reſolved by Fitz-James chief Juſtice, & per totam curiam; That, be the Cuſtome and Preſentment good or not, this is a temporall thing and determinable by the common Law, and not examinable in the ſpirituall Court; and for this, the Biſhop in this caſe hath incurred a Præmunire.

3. That Alibi extends as well to the Courts of the Biſhops, and other Eccleſiaſticall Courts within this Realm, as elſewhere: And ſo the Court ſaid, that it had been often times adjudged, upon which the ſaid Biſhop (the matter of the Indictment being true) confeſſed the ſaid Indictment: And upon this appearing the ſecondary Juſtice gave Judgment againſt him, that the ſaid Biſhop ſhall be out of the protection of the King, and that his Lands, Goods, and Chattels ſhould be forfeited to the King, and his body to be impriſoned Ad voluntatem Regis, &c.

Nicholas Fuller's *Caſe*.

Eccleſiaſticall Commiſſion.

IN the great caſe of Nicholas Fuller of Grayes Inn, theſe poynts were reſolved upon conference had with all the Juſtices and Barons of the Exchequer.

1. That no Conſultation can be granted out of the Term, for this, that it is an award of the Court, and is finall, and cannot be granted by all the Judges out of the Term, nor by any of them within the Term out of Court: And the name of the Writ, Viz. a Writ of Conſultation, imports this, that the Court upon conſultation amongſt them ought to award it.

2. That the construction of the Statute, 1 Eliz. cap. 1. and of the Letters Patents of high Commission in Ecclesiasticall causes founded upon the said Act, belongs to the Judges of the Common Law: For although that the causes, the cognizance of which belongs to them, are meerly spirituall, and the Law by which they proceed is meerly Spirituall, yet their authority and power is given to them by act of Parliament, and Letters Patents, the construction of which belongs to temporall Judges: And for this, the consultation which was granted is with this restraint, Quatenus non agat de authoritate & validitate literarum patentium pro causis Ecclesiasticis vobis vel aliquibus vestrum direct. aut de expositione & interpretatione statuti de anno primo nuper Reginæ, &c. In the same manner as if the King hath a Benefice donative by Letters Patents, although that the Function and Office of the Incumbent be Spirituall, yet inasmuch as he comes to it meerly by Letters Patents of the King, he shall not be visitable nor deprivable by any Ecclesiasticall authority, but by the Chancellor of the King; or by Commissioners under the great Seal.

3. It was resolved when there is any question concerning what power or jurisdiction belongs to Ecclesiasticall Judges, in any particular case, the determination of this belongs to the Judges of the common Law; in what cases they have cognizance, and in what not; for if the Ecclesiasticall Judges shall have the determination of what things they shall have cognizance, and that all that appertains to their Jurisdiction which they shall allow to themselves, they will make no difficulty, Ampliare jurisdictionem suam: And according to this resolution, Bracton lib 5. tract. de except. cap. 15. fol. 412. Cum judex Ecclesiasticus prohibitionem a Rege suscepit, supersedere debet in omni casu, saltem donec constiterit in Curia Regia ad quam pertinet jurisdictionem; quia si Judex ecclesiasticus æstimare debet an sua esset jurisdictio, in omni casu indifferenter procederet, non obstante Regia prohibitione, vide Entries. fol. 445. There was a Question, whether Court Christian should have cognizance of a Lamp. And a Prohibition was granted, Quod non procedant in curia Christianitatis, quousque in curia nostra discussum fuerit, utrum cognitio placiti illius ad Curiam nostram vel ad forum Ecclesiasticum pertineat. And if the determination of a thing which appears to Court Christian, doth appertaine to the Judges of the common Law, the Judges of the common Law have power to grant a Prohibition. And all this appeares in our Bookes, that the Judges of the common Law shall determine in what cases the Ecclesiasticall Judges have power to punish any Pro læsione fidei, 2 H. 4. fol. 10, 11 H. 4. 88. 22 Ed. 4. 20. So of the bounds of Parishes in 5 H. 5. 10. 39 Ed. 3. 23. So it belongs to the Judges of the common Law, to decide who ought to certifie excommunication, and to reject the certificate, when the Ordinary or Commissary is party. 5 Ed. 3. 88 Ed. 3. 69. 70. 18 Ed. 3. 58. 12 Ed. 4. 9 H. 7. 1. 10 H. 7. 9. For this it was resolved cleerely, that if any person slander the authority or power of the high Commissioners, this is to be punished before the Judges of the common Law, for that the determination of their authority and power which is given to them by the Statute, and the Letters Patents of the King, belongs to them, and not Court Christian: And for this, that the many Articles objected against Fuller concerning the slander of their authority and power, was solely determinable and punishable before the Judges of the common Law. One other restraint was added in the consultation: Et quatenus non agat de aliquibus scandalis, contemptibus, seu aliis rebus quæ ad communem legem aut statuta regni nostri Angliæ sunt punienda & determinanda.

4. It was resolved, that if a Councellor at Law, in his argument shall scandall

ſcandall the King or his Government, Temporall or Eccleſiaſticall, this is a Miſdemeanor and contempt to the Court ; for this he is to be indicted, fined, and impriſoned, and not in Court Chriſtian : But if he publiſh any Hereſie, Schiſm, or erroneous Opinion in Religion, he may be for this convented before the Eccleſiaſticall Judges, and there corrected according to the Eccleſiaſticall Law : For the Rule is, Quod non eſt juri conſonum quod quis pro aliis quæ in Curiis noſtris acta ſunt, quorum cognitio ad nos pertinet, trahatur in placitum in Curia Chriſtianitatis, as it appeares in the Book of Entries, fol. 448. So that the intent is, that Hereſie, Schiſm, or ſuch enormous opinions in Religion, doth not appertain to the Cognizance of temporall Courts : For this cauſe a conſultation was granted, Quoad ſchiſmata, hæreſes, & inormiam, impiam vel pernitioſam opinionem in religione, fide, ſeu doctrina Chriſtiana pie & ſalubriter ſtabilita infra regnum noſtrum Angliæ, quorum cognitio ad forum eccleſiaſticum ſpectat, &c. Vide Mich. 18 H. 8 Rot. 78. In Banco Regis. The caſe was, that a Leet was held die Jovis poſt feſtum Sancti Mich. Arch. 17 H. 8. of the Prior of the houſe of St. John de Bethlehem de Sheine, of his Manor of Leviſham in the County of Surrey, before John Beare the Steward there, a grand Jury was charged to inquire for the King of all Offences inquirable within the ſaid Leete, where one Philip Aldwin, who was a Reſident within the ſaid Leete, appeared at the ſaid Leet, Idemque Philippus ſciens quandam Margaretam, uxorem Johanniis Aldwin apud East Greenwich, infra juriſdictionem Letæ prædictæ, pluries perantea corpus ſuum in adulterio vicioſe exercuiſſe, ac volens ipſam Margareram pro republica in exemplum taliter offendere volentium legitime punire, ad dictam magnam juratam ſe perſonaliter exhibuit & eiſdem ſic juratis de dicta mala & vicioſa vita præfatæ Margaretæ inſtructionem & informationem veraciter dedit. Upon which the ſaid Margaret did draw the ſaid Philip into the Court of the Arch-biſhop of Canterbury, and there did Libell againſt him for Defamation of Adultery; And that the ſaid Philip ſaid in hiſce Anglicanis verbis ; Margaret Allen is a Whore and a Bawd, and it is not yet three weeks agone unce a man might take a Prieſt betwixt her legges ; which Engliſh words were parcell of the words by which he informed the Grand Inqueſt at the ſaid Leete : And upon this he had by award of the Court a Prohibition, by which Writ it appeares, Quod per leges hujus Regni Angliæ omnes & ſinguli quicunque Domini Regis ſubditi coram quibuſcunque ipſius Domini Regis Juſticiariis ſeu quocunq; alio viro judiciali officio ſeculari fungente, in aliquam juratam patriæ jurati, vel ad aliquas inſtructiones ſeu informationes alicui hujuſmodi jurat. in evidentias dandas comparentes & evidentias dantes, ab omni impetitione & calumnia in aliqua Curia Chriſtianitatis propterea fienda, quieti & liberi eſſe debent & in perpetuum penitus irreprehen. And by this Record it appeares, & by the Sta. of 10 Ed. 3, c. 11. by which it is provided, that Indictors of Lay-people or Clerks in Turneys, and after delivering them before Juſtices ſhall not be ſued for defamation in Court Chriſtian, but that the Plaintiff who findes himſelf griev'd ſhall have a Prohibition formed in the Chancery upon his caſe, which was but an affirmance of the Common Law, for the Statute provides only for Indictors in the Turne only : And yet as well all Indictors in other Courts, and all Witneſſes, and all others who have affairs in the Temporall Courts, ſhall not be ſued or moleſted in Court Chriſtian, vide Paſch. 6 Eliz. In the Reports of the Lord Dyer (which caſe is not printed) John Halles in the caſe of marriage, between the Earle of Hereford, and the Lady Katherine Gray, declared his opinion againſt the ſentence given by Commiſſioners Delegates of the Queen, in a cauſe Eccleſiaſticall, under the Great Seal :

And

And that the ſaid Sentence in diſ-affirmance of the ſaid marriage was unjuſt, wicked, and void, and that he thought that the ſaid Judges Delegates had done againſt their conſcience, and could not render any reaſon for the ſaid ſentence : And what Offence this was, was referred to divers Judges to conſider, by whom upon great deliberation it was reſolved, that this offence was a contempt as well againſt the Queen, as to the Judges ; and every of them were puniſhable by the common Law, by fine and impriſonment : And that the Queen may upon that ſue for it in what Court ſhe ſhall pleaſe : for the ſlander of a Judge in poynt of his Judgment, be it true or falſe, is not juſtifiable, &c. And all this appears by the report of the Lord Dyer, ſo that in the ſaid conſultation it was well provided, that the high Commiſſioners ſhould not intermeddle with any ſcandall by the common Law.

5. It was reſolved, that when any Libell in Eccleſiaſticall court containes many Articles, if any of them doe not belong to the cognizance of Court Chriſtian, a Prohibition may be generally granted ; and upon motion made, conſultation may be made as to things which do belong to the Spiritual Juriſdiction : For the Writ of conſultation with a Quoad, is frequent and uſuall, but a Prohibition with a Quoad, is Rara avis in terra nigroque ſimillima Cygno. And for theſe reaſons it was reſolved by all that the Prohibition in the caſe at the Bar was well granted, which in truth was granted by Fenner and Crooke Juſtices, in the time of the Vacation.

Note, theſe generall Rules concerning Prohibition, quæ ſparſim inveniantur in libris noſtris.

Articuli Cleri c. 8. Non debet dici tendere in præjudicium Eccleſiaſticæ libertatis quod pro Rege & Repub. neceſſarium videtur.

Entries 444. 44. 7. Non eſt juri conſonum, quod quis ſuper iis quorum cognitio ad nos pertinet in Curia Chriſtianitatis trahatur in placitum.

Circumſpecte agatis, &c. Epiſcopus teneat placitum in Curia Chriſtianitatis de iis quæ mere ſunt ſpiritualia.

Weſt. 2. cap. 43. Prohibeatur de cætero Hoſpitalariis & Templariis ne de cætero trahant aliquem in placitum coram Conſervatoribus privilegiorum de aliqua re cujus cognitio ad forum ſpectat Regium.

Ibidem. Non concedantur citationes priuſquam exprimatur ſuper qua re fieri debet citatio.

The knowledge of all caſes Teſtamentary, Matrimony, &c. by the goodneſs of the Princes, and by the Lawes and Cuſtomes of the Realm appertain to ſpiritual Juriſdiction.

6. It was reſolved, that this eſpecial conſultation, being onely for Hereſie, Schiſm, and erroneous Opinions, &c. That if they convict Fuller of Hereſie, Schiſm, or erroneous Opinion, &c. that if he recant the ſaid Hereſie, Schiſm, or erroneous Opinion, that he ſhall never be puniſhed by Eccleſiaſticall Law : And after the ſaid conſultation granted, the ſaid Commiſſioners proceeded and convicted Fuller of Schiſm and erroneous Opinions, and impriſoned him and fined him two hundred pounds : And after in the ſame Tearme, Fuller by his Councell moved the Court of Kings Bench to have a Habeas Corpus, et ei conceditur, upon which writ the Goaler did return the cauſe of his detention.

Mich.

Mich. 5. Jac. Regis.

NOte, Annates, Primitiæ, and first Fruits, are all one; It was the value of every ſpirituall Living by the year, which the Pope, claiming the diſpoſition of all Eccleſiaſticall Livings within Chriſtendom, reſerved out of every Living; And thoſe and Impropriations began about the time that Polydore Virgil, lib. 8. cap. 2. ſaith Nullum inventum majores Romano Pontifici cumulavit opes quam id quod annuatam vocant, qui uſus omnino multo antiquior eſt quam recentiores ſcriptores ſuſpicantur, & annates more ſuo appellant primos fructus unius anni: vide Concilium Viennenſe quod Clemens Quintus indixit pro annatibus. First fruits, Acts and Monuments, 351. & 352.

Theſe First-fruits were given to the Crown by 26 H. 8. cap. 3.

Note, Hill. 34. Ed. 1. An. 1307. At a Parliament held at Carliſle, great complaint was made of intolerable oppreſſions of Churches and Monaſteries by William Teſta (called Mala Teſta) and the Legate of the Pope, and principally concerning First-fruits, at which Parliament the King by the aſſent of his Barons denied the payment of First-fruits of Spirituall Promotions within England, which were founded by his Progenitors and the Nobles, and others of the Realm, for the ſervice of God, Almes, and Hoſpitality; And to this effect he writ to the Pope, and thereupon the Pope relinquiſhed his demand of First-fruits of Abbeys, in which Parliament the First-fruits for two years were granted to the King.

Decimæ, id eſt, the Tenths of Spiritualties were perpetuall, which in ancient times were paid to the Pope, untill Pope Urbane gave them to R. 2. to aid him againſt Charles King of France, and others who ſupported Clement the ſeventh againſt him. Tenths perpetuall.

And 5 H. 3. by the Buls of the Pope, the Church of England began to pay the Tenths of all their Revenue, as well Spirituall as Temporall to H. 3. for years, Theſe were given to the King by the ſaid act of 26 H. 8. cap. 6. Acts and Monuments, 335. 336. an. Dom. 1266.

Vide Lambert de Priſt. Anglorum, &c. fol. 128. cap. 10. omnes qui haburerint 30. denariat. vivæ pecuniæ in domo ſua, de ſuo proprio, Anglorum lege dabit denarium Sancto Petro, vide ib. inter leges Ivæ. fol. 78. cap. 4. Peter-pence.

Lambert ib. expoſitione verbi, Monies and Peter-pence; Ive King of the Weſt Saxons granted it to the Pope when he was in pilgrimage at Rome. Cambd. Brit. pag. 306 ſaith, that it was Offa the Weſt Saxon King that did grant it: Quære.

Sir Anthony Roper's *Caſe*.

IN the caſe of Sir Anthony Roper, who was drawn before the high Commiſſioners at the Suit of one Bulbrook the Vicar of Bentley, for a Penſion out of a Rectory Impropriate, of which Sir Anthony was ſeiſed in fee: And the high Commiſſioners ſentenced the ſaid Sir Anthony to pay that, which he refuſed; And upon this they committed him to Priſon, who in this Term by Habeas corpus appeared in Court, upon the return of which Writ the matter did appear: And it was well debated by the Juſtices, and was reſolved, that the ſaid Commiſſioners had not authority or commiſſion

commiſſion in the ſaid caſe, for when the acts of the 27 H. 8. & 31 H. 8. of Monaſteries had made Parſonages Impropriate, and other Religious Poſſeſſions Lay-fee, although that Penſions were ſaved, yet, as it appears by the Preamble of the act of 34 H. 8. cap 16, thoſe to whom the Penſions appertain, had not remedy for the ſaid Penſions, &c. And for this there it is provided, that if the Farmer or Occupier of ſuch Poſſeſſions ſhall wilfully deny the payment of any ſuch Penſions, Portions, Corrodies, Indempnities, Synod Priories, or any other Profits, wherof any Arch-biſhop, Biſhop, Arch-deacon, or any other Eccleſiaſtical perſon were in poſſeſſion at, or within ten years next before the time of ſuch diſſolution of any ſuch Monaſtery, &c. that then it ſhall be lawfull for the ſaid Arch-biſhop, Biſhop, or ether Eccleſiaſticall perſon aforeſaid, being ſo denied to be ſatisfied and paid therof: And having right to the thing in demand, to have ſuch proceſſe, as well againſt every ſuch perſon and perſons, as ſo ſhall deny payment, &c. as againſt the Church and Churches charged with the ſame, as heretofore they have lawfully done, and as by, and according to the Lawes of this Realm they may now lawfully do, &c. And if the King hath covenanted to diſcharge the Patentee, &c. of Penſions, and then ſuit ſhall be made for the ſame in the Court of Augmentations, and not elſewhere; then if the high Commiſſioners will determine of Penſions, they ought to do it by the act 34 H. 8. and the ſaid act gives this expreſly to Ordinaries, and their Officials, and the high Commiſſioners have their authority by the act 1 Eliz. made a long time after.

But it was objected, that the ſaid act 1 Eliz. gave to the Queen, her Heirs and Succeſſors, power to aſſign Commiſſioners to exerciſe and execute all manner of Juriſdiction Spiritual, to viſit, reform, &c. all Schiſm and Hereſie, &c. and Enormites which by any manner of Spiritual Juriſdicton can, or lawfully may be reformed. And it was ſaid, that ſuch Spirituall Juriſdiction which the Biſhop ſhould have, is tranſferred to the high Commiſſioners.

But it was unanimouſly reſolved by Coke, Walmſley, Warberton, Daniel and Foſter, Juſtices, that the Act 1 Eliz. doth not extend to this caſe for divers cauſes. viz.

1. For that the ſaid clauſe of Reſignation is not more large then the clauſe of Reſtitution; and that the act of 1 Eliz. doth not take away nor alter any act of Parliament, unleſſe thoſe only which are expreſly named in the act: and it was reſolved that the high Commiſſioners cannot hold plea for the double value of Tythes carried away before ſeverance, for two cauſes,

(1.) For this, that the Statute 2 Ed. 6. cap. 13. gave the Cognizance of it to Spirituall Judges, which is to be intended of ſuch Spirituall Judges who then were.

(2.) Subſtraction of Tythes is injury and no crime, but concerns intereſt and property: And for this the high Commiſſioners cannot meddle with it.

2. For that the words of the act 1 Eliz. are (which by any manner of Spirituall Juriſdiction can or lawfully may be reformed) And it appears that theſe words extend to the crime only, and not to caſes of Intereſt betwixt party and party: for the words are: All ſuch Errors, Hereſies, &c. which by any manner, &c. ſo that (ſuch) and (which) are Relatives.

3. This Juriſdiction was given to the Biſhops by act of parliament, viz. by 34 H. 8. which is more temporall then ſpirituall: And for this out of the precedent words 1 Eliz. viz. Spiritual or Eccleſiaſticall Juriſdiction, which is to be intended of Juriſdictions meerly or purely Spiritual,

ritual, but acts of Parliament are more temporall then ſpirituall.

4. It was not the intent of the act 1 Eliz. which revived the Statute 23 H. 8. cap. 9. by which act it is enacted, that none ſhall be ſued out of his Dioceſſe, &c. that the high Commiſſioners for private cauſes ſhall ſend for Subjects out of any part of the Realm, and ſo in effect confound the Juriſdiction of the Ordinary who is an Officer and Miniſter ſo neceſſary that in divers cauſes the Courts of the King cannot adminiſter to Subjects without him, &c.

5. If the act of 1 Eliz. had ertended to give to high Commiſſioners power to determine meam & tuum, as Penſions, Tythes, Legacies, Matrimonies, Divorces, Adminiſtrations, Probates of Teſtaments, &c. the act would alſo give the party grieved benefit of appeal, and not give abſolute authority to the high Commiſſioners finally to determine Meum & tuum, and to baſtardiſe Iſſues, &c. without any controlement, for this ſhould be diſſolved the Court of the Ordinary which is ſo antient and inevitably neceſſary in many caſes to the adminiſtration of Juſtice, in divers points of it, that without this Juſtice cannot be executed.

6. The high Commiſſioners cannot extend themſelves but only to Crimes, for the clauſe which gives to them power to impriſon, &c. and to puniſh, &c. and impriſon ſuch Offender, &c. And (Offender) is only to be intended of him who commits any crime, and not of him who detains Penſion, Legacy, Tythes, &c.

Mich. Jac. Rot. 2254.

Hab. Corpus retorn, and diſcharge by judgement of the Court.

PRæceptum fuit Guardiano priſonæ Domini Regis de Fleet, Quod haberet hic; viz. apud Weſtmonaſterium immediate poſt receptionem hujus brevis corpus Anthonii Roper militis in priſona prædicta ſub cuſtodia ſua detenti quocunque nomine cenſeretur, una cum die & cauſa captionis & detentionis ejuſdem Anthonii: Et iidem Juſticiarii hic, viſa cauſa illa, ulterius fieri fecerint quod de jure & ſecundum legem & conſuetudinem regni Domini Regis Angliæ fuerit faciendum: Et modo hic ad hunc diem, ſcilicet diem Sabbati proximum poſt octabis Sancti Mich. iſto eodem termino venit prædictus Anthonius in propria perſona ſua ſub Cuſtodia prædicti Guardiani ad barram, hic prædict. & idem Guardianus, tunc hic mand. Quod ante adventum brevis prædicti, viz. nono die octabis ultimo prætertio prædictus Anthonius Roper miles reducit ſe priſonæ prædictæ perantea commiſſus virtute cujuſdem warranti, dati 30. die Junii ultimo præterit, quod ſequitur in hæc verba, viz.

THeſe are in his Majeſties name to require and charge you, by vertue of his high Commiſſion for cauſes Eccleſiaſticall, under the great Seal of England, to us and others directed, that herewith you receive and take into your Cuſtody the body of Sir Anthony Roper, Knight, and him ſafely detain Priſoner at this our commandment, untill we ſhall give order for his enlargment, ſignifying unto you, that the cauſe of his commitment is, for that there being a certain cauſe referred unto us by his Majeſties ſpeciall direction, betwixt him the ſaid Sir Anthony Roper and John Bulbrook Vicar of Bentley, for that he detained wrongfully from him the ſaid Vicar, a certain yearly Penſion due unto him from the ſaid Sir Anthony; And being thereupon called before us, and after full hearing of the

the cauſe in the preſence of Sir Anthony and his Councell at three or four ſeverall times, and at the laſt adjudged by us to pay the ſaid Penſion, he having ſometime of deliberation given unto him by us to conſider thereof, hath notwithſtanding obſtinately diſobeyed the ſaid Order, and doth ſo ſtill perſiſt: And this ſhall be your Warrant in that behalf; Given at Lambeth this thirtieth of June, 1607. Et quod hæc fuit Cauſa Captionis & detentionis, prædicti Anthonii in priſona prædicta, corpus tamen prædicti Anthonii modo hic paratus habet prout per breve prædictum ſibi præceptum fuit, &c. ſuper quo, viſis præmiſſis & per Juſticiarios hic plenius examinatis & intellectis, videtur ijſdem Iuſtic. hic quod prædicta Cauſa commiſſionis prædicti Anthonii priſonæ de Fleet prædict. in retorno prædict: ſuperius ſpecificata minus ſufficiens in lege exiſtit ad detinendum prædictum Anthonium in priſona prædict. Ideo prædictus Anthonius á priſona prædicta per Curiam hic dimittitur, ac idem Guardianus de hujuſmodi Cuſtodia per eadem Curiam hic plene exoneretur &c. And this was reſolved una voce by Coke cheif Juſtice, VValmſly, VVarberton, Daniell, and Foſter Juſtices, for the cauſes and reaſons afore expreſſed.

And in the very ſame Term in Lanes, caſe, a Parſon in Norfolk who ſued one of his Pariſhioners before the high Commiſſioners, for ſcandaling of him, ſaying in the Church on the Sabbath before al his Pariſhioners, That he was a wicked man, and an arrant Knave: Prohibition lyes, for this, that it was not ſo enormous as the Statute intended: Note, that by expreſſe Proviſo, the high Commiſſioners cannot intermeddle with all Hereſies, but with exorbitant Hereſies, &c. and the other ſhall be determined before the Ordinary.

Hill. 5. Jac.

Juſtice of *Wales* cannot be by Commiſſio, nbut by Patent.

NOte, it was moved to the Juſtices this very Term, upon conſideration of the acts of 34 H. 8. cap. 28. and the 18 Eliz. If the Juſtices in VVales may be conſtituted by Commiſſion; and upon conference it was conceived they could not, but that it ought to be by Patent, as it hath been uſed ever ſince the act 34 H. 8. Then it was moved, if the King which now is, may by force of a clauſe of 34 H. 8. do it, which clauſe is, That the Kings moſt Royall Majeſty ſhall and may at all times hereafter from time to time, change, add, order, alter, miniſh, and reform all manner of things before rehearſed, as to his moſt excellent wiſdom and diſcretion ſhall ſeem meet: And alſo to make Lawes and Ordinances for the Commonwealth, and good quiet of his ſaid Dominion of VVales, and his Subjects of the ſame, from time to time, at his Majeſties pleaſure. And it ſeemed to divers of the Juſtices, that this power given to the King determined by his death, for divers cauſes.

1. It wants theſe words, His Succeſſors, and for this it ought to be drawn in ſucceſſion by conſtruction, and that ſhould be againſt the intention of the makers of the act, for they gave this high power of alteration, &c. of the Laws to the Kings moſt excellent Majeſty, as to his moſt excellent wiſdom and diſcretion ſhall be thought moſt meet; which words want, His Succeſſors: For as his wiſdom and diſcretion, which they well knew, did not go in ſucceſſion, ſo the power and great confidence which was annexed to them did not go in ſucceſſion; and for this, that Eorum progreſſus oſtendunt multa quæ ab initio provideri non poſſunt: And what enſues upon this Act of the 34 H. 8. concerning the uniting of VVales

Walesand England, and the ſubjection of them to the Lawes of England, none could divine: For this cauſe it was thought reaſonable that King H. 8. during his time, might alter them; that he ſeeing the obedience of thoſe of Wales, and the good fruit which proceeded out of the ſaid Act, never altered any part of it: But it was never the intention of the ſaid Act to give power to the King and his Succeſſors for ever, to alter, &c. the Laws, ſo that none of that Country could be certain of his Life, Lands, Goods or liberty, or any thing which he hath, and that would be a great ſervitude, Miſera ſervitus eſt, ubi jus eſt vagum: Alſo the words are for the Common-wealth, &c. i. his Majeſties Subjects of Wales, at his Majeſties pleaſure, &c. by which it appears that the intention of the makers of the Act, was to give this power to King H. 8. for his pleaſure, did determine by his death.

2. Power of alteration of Lawes, &c. is a poynt of high confidence concerning the adminiſtration of Juſtice, which the act by omitting [of his Succeſſors] intended to unite this confidence to the perſon of H. 8. and not to extend it without limitation of time to his Succeſſors: And this ſtands with the conſtruction of Law in other caſes, for all Commiſſions concerning the adminiſtration of Juſtice, determine by the death of the King, yea he conſtitutes them Juſticiarios ſuos, which authority being in caſe of Adminiſtration of Juſtice determines by the death of the King, or reſignation, 1 Ed. 5. 1. 1 H. 7. 1. 14 Ed. 4. 44. yet if the King make a Leaſe Durante bene placito, or preſent one to a Church, theſe are not void by his death, untill they are controlled or revoked by his Succeſſor: But the Office of a Sheriff which is granted, Durante bene placito, determines by the death of the King, for this concernes the adminiſtration of Juſtice: And upon certificate of the opinion of the Juſtices, that the Juſtices of Wales cannot be conſtituted by commiſſion to the Lord Chancellor, Baron Snigg had a Patent for the circuit of Wales, as others had before.

Trin. 6. Jac.

THis Terme it was reſolved Per totam Curiam in Communi banco, viz. Coke chief Juſtice, Walmſley, Warberton, Daniel, and Foſter, in the caſe of Allan Ball, that the high commiſſioners cannot by force of the Act, 1 Eliz. cap. 1. ſend a Purſivant to arreſt any perſon ſubject to their Juriſdiction, to anſwer to any matter before them: But they ought to proceed according to Eccleſiaſticall Law, by citation: For the Statute 1 Eliz. did not give them any ſuch authority to arreſt the body of any Subject upon ſurmiſe: and although that it be compriſed within their Commiſſion, that they may ſend for any by Purſivant, &c. yet inaſmuch as this hath no foundation upon the act of 1 Eliz. the King by his commiſſion cannot alter the Eccleſiaſticall Law, nor the proceedings of it, for the Act ſayes, that the Commiſſioners ſhall exerciſe, uſe, and execute all the Premiſſes (according to the priviledge of the Act) according to the ſaid Letters Patents, Id eſt, the Letters Patents which are mentioned and authority before, for this is imployed within this word (ſaid) and for this without Queſtion, the Commiſſion onely without the Act cannot alter the proceedings of the Eccleſiaſticall Law: And in the Circuit of Northampton, when the Lord Anderſon and Glanvile were Juſtices of Aſſiſe, a Purſivant was ſent by the Commiſſioners to arreſt the body of a man to appeare before them, and

High Commiſſion. Purſivant.

Simpſons Caſe before the Judges of Aſſiſe in *Northamptonſhire*. 42. *Elizabeth.*

in reſiſtance of the arreſt, and ſtriving amongſt them, the Purſivant was killed: And if this was Murther or not, was doubted, and this depended upon the validity of power and authority of the Purſivant, for if his Authority was lawfull, then in killing of an Officer of Juſtice in execution of his Office, is murther: And adviſement was taken till the next Aſſiſes; and upon conference at the next Aſſiſes it was reſolved, that the arreſt was Tortius, and by conſequence that this was not murther: But they may ſend Citation by a Purſivant, and proceed, if the party make default, to excommunication, and ther to have a Capias excommunicatum, and to impriſon him by the Writt of the King, which Writ De excommunicato capiendo, is preſerved and retornable by the Statute of 5 Eliz. which ſhall be in vain, if they may arreſt him by a Purſivant before any anſwer or default made: And this will be againſt the Statute of Magna charta, and all the ancient Statutes, which ſee Raſtall, Title Accuſation: If a free-man ſhall be arreſted upon a bare ſurmiſe or accuſation: which Statutes if good and profitable for the Weal-publike, never were intended to be repealed by the ſaid Statute of 1 Eliz.

Note, that neither the Star-chamber nor Chancery awards any Meſſenger to arreſt the Body untill a contempt made, but firſt a Subpœna, &c.

Marmaduke Langdale's *Caſe. vi.* 58.

High Commiſſion.

IN the caſe of Marmaduke Langdale of Leaventhorpe in the County of York, by Joane his Wife, being ſued for maintenance before the Biſhop of Canterbury, and other high commiſſioners: It was reſolved Per totam Curiam, præter VValmſley who doubted of it, that a Prohibition, which before was granted, was well maintainable, for this, that it was not any enormity, nor any Offence within the Statute, but a neglect of his duty, and a breach of his vow of maintenance; alſo the party ſhall be defeated of his appeale: And for that reaſon it belongs to the Court of the Ordinary: And the Rule of the Court was, that the Plaintiff ſhall count againſt the high Commiſſioners (for againſt his Wife being one perſon in Law with him, he could not count) and upon demurrer joyned, the caſe to be argued and adjudged, upon which the party grieved may have a Writt of Error, Si ſibi viderit expedire, &c. See more, fol. 58.

On Sunday laſt, my Lord chief Juſtice and my ſelf, at Serjeants Inn in the after-noon, received by the hands of the Kings Attorney by commandment, as he ſignified to us by your Lordſhips, the ſaid complaints, exhibited to his Majeſty by the Lord Preſident of VVales, and the Lord Preſident of Yorke, againſt the Judges of the Realme, with a ſignification of your Lordſhips pleaſure, that we two ſhould impart the ſame to the reſt of our Brethren, which we did on Munday in the after-noone, the fore-noone being ſpent in the publicke ſervice of the Realme, at VVeſtminſter: And upon conſideration had of parts of the complaint, we have, as this ſhort time will give us leave, being daily imployed, as well in the Courts at VVeſtminſter, as ſome of us for tryalls of Writs of Niſi prius, reſolved upon theſe anſwers, which we knowing to be Warranted by the Lawes of this Realm, doubt not but will be allowed by your Lordſhips; And doe hope that where the Judges of this Realm have beene more often called before your Lordſhips, then in former times they have beene

been, which is much obſerved, and gives much emboldning to the Vulgar, that after this day we ſhall not be ſo often (upon ſuch complaints, your Lordſhips being truly informed of our proceedings) hereafter called before you.

And ſeeing that my Lord Preſident of York hath now Ore tenus, firſt opened the cauſe of his grief more amply, and in ſome caſes more particularly, I will begin to thoſe objections that have been made on the behalf of that Councill, wherein for method, and for avoiding of confuſion, I will firſt ſpeak to the true cauſe of the Inſtitution of that Court.

2. That our proceedings in granting of Prohibitions, is for the matter juſtifiable by Law.

3. That the manner of our proceedings was reſpectfull and comly towards the Lord Preſident of York, and the Council there.

4. Anſwers to all objections both particular and general.

5. Remedies for the time paſt, if there be juſt cauſe.

6. And laſtly, remedies for the future, to take away all the cauſes of oppoſition between the Judges and both the ſaid Councils: Viz.

After the ſuppreſſion of all Religious houſes to the value of two hundred pound, or under, An. 27 H. 8. in the beginning of October, An. 28 H. 8. there was a great inſurrection of the Lord Huſſey, and twenty thouſand perſons in Lincolnſhire, about the cauſe of Religion, againſt whom Charles Brandon Duke of Suffolk went and appeaſed them.

As ſoon as they were appeaſed, a great Commotion began of 40000 men of that County, Sir Robert Ask being Chief, againſt whom the Duke of Norfolke went and diſperſed them. Soon after in Lancaſhire began a great Rebellion of men of that County, and of Cumberland, Weſtmerland, and Northumberland; againſt whom the Earl of Derby was imployed, and quieted them: After that, Muſgrave Tilby, and others, began to raiſe a great number, and aſſaulted Carlile Caſtle, whom the Duke of Norfolk overthrew.

Preſently after Sir Francis Bigot with a multitude of people, made an Inſurrection at Setrington, Leigh, Pickering, and Scarbrough in Yorkſhire, whom the Duke of Norfolk pacified: And ſoon after the Lord Darcy, Ask, Conſtable, Bulmer, &c. began a new Commotion about Hull in Yorkſhire, whom the Duke of Norfolk appeaſed. And all theſe Rebellions were between the beginnings of 28, and 30. of H. 8. within which time many of the Rebels were executed in Furore belli, and in Flagranti crimine, by Marſhal Law, and ſome attainted by the Common-Law. The King intending the ſuppreſſion of the greater houſes of Religion, which An. 31 H. 8. he effected, he eſtabliſhed a Councel there for the quiet of the Countries of Yorkſhire, Northumberland, Weſtmerland, Cumberland, Dureſme, the Counties of the Citty of York, Kingſton upon Hull, and Newcaſtle upon Tine, for preventions of Riots, Tumults, and Inſurrections in thoſe Counties and places: In this time of neceſſity and danger, the King did arme the Preſident and Councel with two authorities in one Commiſſion: the one a Commiſſion of Oyer and Terminer, de quibuſcunque congregationibus & conventiculis illicitis coadunationibus, conferationibus Lolardiis, impriſionibus falſis, allegatis, trangreſſionibus, Riotis, Routis, retentionibus, contemptibus, falſicatibus, mainutenentiis, oppreſſionibus, violentiis, extortionibus & aliis malefactis, offenſis, & injuriis quibuſcunque, per quæ pax & tranquillitas ſubditorum noſtrorum Comitatibus, Civitatibus, & villis prædictis gravat, &c. Secundum legem & conſuetudinem regni noſtri Angliæ vel aliter ſecundum ſanas diſcretiones veſtras audiendum & terminandum.

The other authority was, Nec non quaſcunque actiones reales, ſeu de libero tenemento, & perſonales, cauſaſque debitorum & demandorum quorumcunq;

rumcunq; in Com. &c. prædictis, quando ambæ partes vel altera pars ſic gravata paupertate gravata fuerit quod commode Jus ſuum ſecundum legem Regni noſtri aliter proſequi non poſſit, ſimiliter ſecundum leges et conſuetudines regni noſtri Angliæ vel aliter ſecundum ſanas diſcretiones veſtras. And this is all the authority that the Preſident and Councel had firſt expreſſed in their Patents, without any private Inſtructions: And this appears by the Commiſſion under the great Seal, 31 H. 8. 6 Pars. Roberto Landavenſi Epiſcopo Præſidenti Concilii, & aliis; out of which Charter theſe things were obſerved, Viz.

1. That the final intention of the Commiſſion was, Quod pax & tranquillitas ſubditorum præſerventur.

2. That they hear and determine Riots, Routs, &c. according to Law, or their diſcretions, which authority by diſcretion was added, Ad faciendum populum: For it was reſolved without Queſtion, that in ſuch caſes they had not power but to proceed according to Law, for that is Summa diſcretio, and not according to their private conceits and affections, quia talis diſcretio diſcretionem confundit, ſo the other clauſe concerning reall and perſonall Actions in all the Counties of York, Northumberland, Cumberland, Weſtmerland, Dureſme, and the Towns aforeſaid was only Ad faciendum populum, for this was utterly void in Law. For,

1. No ſuch generall authority granted, may be made by the Commiſſion of the King, to hear and determine all reall actions within ſuch a County according to Law, as he may by Charter within a certain County or particular place, for the King by Commiſſion may give power to determine criminall cauſes betweene the King and the party, Secundum legem & conſuetudinem Angliæ, but he cannot give power by Commiſſion to determine cauſes between party and party: As it was reſolved in Scrogg's caſe, An. 2 Eliz. fol. 175. in Dyer. vide Dyer. 236. But the King by his Letters Patents may grant to ſuch a Corporation in ſuch a Town, Tenere placita realia, perſonalia, & mixta; And none by this can have any prejudice, for the proceeding ought to be according to Law; and if they erre, the party grieved may have his Writ of Error: but the Court cannot grant to them a Court of Equity for the cauſe aforeſaid; And for this cauſe, that ſuch a Judge ſhould be without controlement: And it was ſaid, that if ſuch Commiſſioners cannot determine Felonies, or other criminall cauſes by Writ, but by Commiſſion, ſo cannot any determine private cauſes betwixt party and party by Commiſſion but by Writ, by the Statute of Magna Charta, cap. 12, and Weſt. 2. cap. 30. Recognitiones de nova diſſeiſina, &c. non capiantur niſi in propriis Comitatibus: Which Act gives authority to Juſtices of Aſſiſe in their proper Counties, by which it appears, that without an Act of Parliament, the King by his Letters Patents cannot put and authoriſe Juſtices De Aſſiſes Capiendas, to take them within another County: And for this the ancient Preſidents and proceedings of Law ought not to be altered. As a Juſtice of one Bench, or of the other, ought to be made by Commiſſion, and not by Writ, and yet he may be diſcharged by Writ 5 Ed. 4. 32. But Juſtices in Eyre are by Writ, as it appears by Bracton, lib. 3. cap. 11, and Britton fol. 1. Alſo by the Statute of Weſt 2. cap. 30. and of York cap. 4. Juſtices of Niſi prius, give Judgment in Aſſiſes of Darrein preſentement, and quare impedit in ſuch a County, which cannot be done without Parliament, Et ſic de cæteris.

Alſo it was obſerved, that at the firſt the ſaid Commiſſion concerning actions between party and party, extended only when both the parties, or one of them were ſo poor, as they were not able to proſecute at Law: Alſo by the firſt Inſtitution they had no power to grant Injunctions. And laſtly,

ly their Commiſſion was Patent under the great Seal, and inrolled in Chancery: And thus much was ſaid for the Firſt, concerning the true cauſe of the Inſtitution of the Court, Viz. For preventing of Tumults and Rebellions, and when it began.

2. As to the ſecond point, the granting of Writs of Habeas Corpus, and Prohibitions, is juſtifiable by Law; for wheras at the firſt their authority was Patent, it is now private; for the Letters Patents do refer unto certain Inſtructions which are no where of Record, but kept in private, and it was feared, for private reſpects, Et de non apparentibus & non exiſtentibus eadem eſt ratio: beſides, the danger to the Subject is great, for if they loſe their Inſtructions (as it hath hapned heretofore) all is Coram non judice: And this firſt reaſon is drawn from the Inſtructions themſelves: The ſecond reaſon is drawn from the contumacy of the party that ſuppoſeth himſelf to be grieved by the Prohibition, and againſt whom it is granted; if the authority of the Councell be never ſo good, yet being late and particular Juriſdiction, the party muſt of neceſſity plead it, ſo as it may appear unto us judicially; for as we are Judges of Record, ſo muſt we be informed of Record, and never yet hath any party prohibited moved in Court to have a conſultation, by which might be ſet forth the Juriſdiction of that Court and Councell, ſo as the granting of Prohibitions hath been juſt; and the fault (if any be) in the parties themſelves, that never hitherto made their cauſe known, as it ought to be by Law, to the Court.

The third reaſon is drawn from the great injury offered to the defendants, for it is a true Rule, Miſera ſervitus ubi jus eſt vagum aut incertum: The Defendants by Law, may in all Courts plead to the Juriſdiction of the Court; but how can they do ſo when no man can poſſibly know what Juriſdiction they have: concerning matters of State, which are Arcana imperij, it is meet they ſhould be kept Sub ſigillo conſilij, and in ſecret: but for Juriſdiction between party and party, for deciding of Meum & tuum, God forbid they ſhould not be known to them who are to be judged by them; but the keeping of them in ſuch ſecrecy bewraieth, that the Councell are affraid that they would not be juſtified if they were known: And it was concluded again, Miſera ſervitus ubijus aut vagum aut incertum.

3. But proceedings herein have been reſpectfull; for a Jury of Officers and Attorneys of our Court, being according to an ancient cuſtom, time out of mind of man uſed, ſworn to preſent amongſt other things and Articles, all defaults of Officers and Miniſters in not executing the Writs and Proceſs out of this Court, and all impediments & hinderances whatſoever of the due proceedings of this Court, whereby Juſtice cannot be adminiſtred: And finding upon their Oaths divers unjuſt & undue impediments of the proceedings of this Court, by the ſaid Councell in particular: And thereupon a motion being made in open Court in Michaelmas Term laſt, by the Kings Serjeant Philipps, of many intolerable grievances of the Subject, offered by the ſaid Councell, to many of his Majeſties Subjects in derogation of the Kings Lawes, in prejudice of the Kings profits, and in hinderance of the due proceedings of this Court, prayed the Court according to Law and Juſtice, to grant ſeverall Prohibitions in all thoſe ſeverall cauſes, which we could not deny; but yet thought fit before we granted the ſame, that there might be a good correſpondence between both Courts, we ſhould firſt confer with Sir Cuthbert Pepper, Attorney of the Wards and one of that Councell, to let him underſtand the particular grievances and oppreſſions, and to hear what he could ſay in the juſtificaion thereof, who accordingly upon motion came to us to Serjeants-Inn, with whom

whom we conferred, and ſignified to him the particulars of the ſaid grievances, who would not take upon him to juſtifie the ſame in no ſort, but ſaid, he would acquaint the Preſident and Councell therewith, and return their anſwer, which for that it was neglected, we upon further motion in Court granted Prohibitions, as in Juſtice we ought, which courſe and order of proceedings we hold to be reſpectfull and comly toward the Lord Preſident and Councell.

4. It was objected, that more Prohibitions had been granted of late, then in many years before, wherunto a firfold anſwer was made.

1. That they had exceedingly multiplied the number of cauſes, ſo as they have above two thouſand depending at one time, and having but five Counties and three Towns, at one ſitting there were about 450 cauſes at hearing, whereas the Chancery that extends into 41 Counties Engliſh, and 12 in Wales, in all 53, had in Eaſter Term, but 95 to be heard, and in Trin. Term, but 72; ſo as if they multiply their cauſes ſo infinitely above what were at the firſt, it is no wonder if the number of Prohibitions be increaſed.

2. Beſides the multiplication they have innovated and taken upon them to deal in cauſes which we know never any Preſident could, and we think never any Preſident and Councell did uſury: As firſt, Suits upon penall Lawes, and many of them limited to the Courts at VVeſtminſter, but all of them without queſtion out of their Juriſdiction: As for example, between Harriſon and Thurſtone in Engliſh Bill, upon the Statute 39 Eliz. of Tillage, whereas the very Statute giveth Juriſdicton to certain ſpeciall Courts: The defendants pleaded to the Juriſdiction, wherupon an Attachment was awarded againſt him, and fined.

2. In the caſe of Hartley after Indictment of forcible entry and reſtitution, according to the Statute upon an Engliſh Bill diſpoſſeſſed by the Preſident.

3. And after a recovery in an Ejectione firmæ, and execution by Habere facias poſſeſſionem out of our Court, they upon an Engliſh bill, diſpoſſeſs'd the Plaintiff, and this was Harts caſe. Between Jackſon and Philipps, after Judgment in our Court, ſuit there by Engliſh Bill. Between Stanton and Child, after execution in debt by proceſſe out of our Court they commit the Plaintiff, an old man and lame. Between Binns and Collet, after the Defendant was outlawed in an action of Battery.

4. They admit Engliſh Bills in the nature of Writs of Error, and of Formedons and other reall actions.

5. They will admit no plea of Out-lawry in diſability of the Plaintiff.

6. They uſually granted Injunctions to ſtay the common Law, which is utterly againſt Law, and ſomtimes to ſtay ſuits in Chancery, and in the Exchequer Chamber, and many other proceedings which are againſt Law and reaſon, to the great oppreſſion and grievance of the Subject, ſo in reſpect as well of the multiplication of Suits as Innovations of others. It may very well be that more Prohibitions and Habeas Corpus have been granted of late then were in times paſt; And yet there hath been more granted, and more ancient then is ſuppoſed: For Mich. 7. Eliz. Rot. 31. upon a motion made by Carus, the Kings Serjeant, Habeas Corpus was granted out of the Kings Bench, for the body of John Lamburn, alias Lambert, which Writ being returned, that he went to the Caſtle of York, where John Lambert was a Priſoner, and that one Oſwald VVilkinſon, the Gaoler refuſed to deliver him, without the leave of the Arch-biſhop of York, Preſident of the Councell there, wherupon he went to the Arch-biſhop,

Arch-biſhop, and ſhewed unto him the Queens Writ of Habeas Corpus, whereunto the Arch-biſhop anſwered, that John Lambert was not the Sheriffs Priſoner, but was committed by him and the Councel to the Goalers cuſtody, and therefore he ſhould not be delivered, and therefore he ſent one Morgan his Secretary to the Goaler, that he ſhould not be delivered; And thereupon as well for the contempt in the Arch-biſhop, and the Goaler as for the inſufficient return in not having the body, Carus the Kings Serjeant moved for an Attachment againſt the Arch-biſhop of York, and VVilkinſon the Goaler, for the contempt returned by the Sheriff, and it was granted, and the Sheriff was amerced, for that he ſhewed no lawfull cauſe, Mich. 7. &. 8. Eliz. in libro de Habeas Corpus. John Dawſon in Priſon for a Riot, by Engliſh Bill, before the Preſident and Councell of York, removed by Habeas Corpus and delivered: for no man ought to be convicted for a Riot, but by Indictment, tryall, or other due proceſſe at Law: and there are many other like Writs of latter time, Paſch. 12. Eliz. in libro de Habeas Corpus, Thomas ap Morgan, committed by the Councell and Preſident of VVales &c. and finding the cauſe unjuſt, bailed him, &c. And in Trin. 20. Eliz. ib. the like Writ for the body of John Rowland, committed by the Preſident and Councell of VVales, and finding by the return that the commitment of him was againſt Law, he was diſcharged by the Court, and many more of that nature.

3. The Judges never grant either Prohibitions or Habeas Corpus, but upon motion or complaint by the party grieved, ſo as if the parties have greater cauſe of complaint then they had in times paſt, there muſt of neceſſity be more Writs of Prohibition and Habeas Corpus granted then was therefore.

4. The proceedings before the Preſident and Councell, are by abſolute power, their decrees uncontrollable and finall, and more finall then a Judgment in a Writ of Right, for therupon a Writ of Error lyeth, but theſe ſentences are unreverſible, which makes them adventure, and preſume too much upon their authority, and tends to the great oppreſſion and grievance of the Subject.

5. Theſe Suits there grow to be more prejudiciall to the King then ever they have been, for by the multiplication and innovation of Suits, as well reall as perſonall, the King loſeth his Fines, &c.

5. Remedy for the time paſt, if we have erred in Judgment, a Writ of Error lieth in the Kings Bench; if the Kings Bench doth erre, a Writ of Error lieth in the Upper houſe of Parliament, where the King and the Lords be only Judges.

6. For the time to come, firſt, that the Inſtructions be enrolled in the Chancery, whereunto the Subject may have acceſſ, and know their Juriſdiction. 2. That the Preſidents and Councils have ſome Councell learned in the Court, who may inform us judicially of their true Juriſdiction, and we will give a day to them before we grant any Writ, to ſhew cauſe to the contrary; ſo as Juſtice upon hearing of both ſides ſhall be done; and if we err, the Law hath provided a remedy by a Writ of Error, and no other courſe can be taken: And we are ſworn both to maintain the Kings Prerogative and to do Juſtice to all men, according to the Lawes and Cuſtoms of England: So as command my Lords, whatſoever it ſhall pleaſe you, that lyeth in our power, and which by our Oath we may perform, and we will moſt willingly obey it: And that which a great Divine ſaid to God Almighty, we ſay unto your Lordſhips who ſit in Gods Seat, Da Domine quod jubes, & jube quod vis, &c.

The

The particular cases set down in the Petition are answered in the second part of our proceedings justifiable untill they plead their Jurisdiction, and make it appear to the Court to be lawfull. Concerning the Jury of Attorneys, it hath been answered before: And for the motion to have a Rule set down, &c. It was moved by the Kings Serjeant, and we advised thereupon: when this had been thus delivered, by way of answer, Bacon the Kings Sollicitor offered to reply, but after the Judge had spoken in the name of all his Brethren, the Lords would not suffer him to speak after the Judge; But all others being desired to retire into the next Chamber, the Lords had long and prudent conference amongst themselves, and after we were called in again, and then the Earl of Salisbury, Lord Treasurer, by the consent of that Honourable Table, gave this Resolution;

I

1. That the Instructions should be recorded for so much as concern'd either criminall Causes, or Causes between party and party: As for matters of State, if any be, the same not to be published.

2. That it was necessary, that both Councils should be within the Survey of Westminster Hall. Viz. The Courts of Westminster.

3. The motion was well allowed, that the Presidents and Councils should have Councell learned in every Court: And that upon motion made in open Court, upon any Prohibition, to either of them, day should be given to shew Cause, &c.

4. The Lord Treasurer repeated the sentence, and said, that true it is, *Ubi Lex aut vaga aut incerta, miserrima est servitus*, where mens Estates and fortunes shall be decided by discretion.

And concerning the remoteness of the place, what reason should there be at this time more for those parts, then for the Counties of Cornwall and Devon, which are more remote then York? And this was an end of this daie's work.

Heresie, Upon conference with Sir *John Popham* and others, An. 43 Eliz.

The Archbishop and other Bishops and other the clergy at a generall Synod or Convocation might convict an Heretick by the common Law. But for this, that it was troublesome to call a convocation of the whole Province, it was ordained by the Statute of 2 H. 4. cap. 15. That every Bishop in his Dioceese might convict Hereticks; And Note 2. Mary Brook, title Heresy, per omnes Justic. & Baker Chancellor of the Exchequer, and Hare Master of the rolls by that Statute. And if the Sheriff was present, he might deliver the party convict to be burnt, without any Writ De hæretico comburendo: But if the Sheriff be absent, or if he be to be burnt in another County, then there ought to be a Writ De hæretico comburendo; And that the common Law was such, vide lib. intra. title Indictment, p. 11. who there are taken for Hereticks, some of them are consonant to true Religion, vide 11 H, 7. Book of Entries fol. 319. see Dr. & St. lib. 2 cap. 29. Cosin. 48. 2. see the Statute of 1 & 2. P. M. cap. 6. That Ordinaries wanting authority to proceed against Hereticks, 3. F N. B fol. 269, And the Writ in the Register, which in the new Writ is omitted proves this directly, 4. Bracton, lib. 3. cap. 9. fol. 123, 124. Concilio Oxoniensi quidam Diaconus convictus fuit de Apostasia, sed primo degradatus fuit per Ordinarium: And true it is, that every Ordinary may convent

convent any Heretick or Schiſmatick before him, Pro ſalute animæ, and may degrade him, as Bracton ſaith, and may injoyn him penance according to the cenſure of Eccleſiaſticall Law: But upon ſuch conviction at Common-Law, the party convict ſhall not be burnt, nor any Writ De hæretico comburendo lyeth upon it; for the common Law will not commit the Deciſion of a Hereſie, for the life of a Chriſtian man, to any ſole Judge.

The makers of the Act of 1 Eliz. were in doubt what ſhall be adjudged Hereſie, and therefore if any perſon be charged with Hereſie before the high Commiſſioners they have no authority to judge any matter or cauſe to be Hereſie, but onely ſuch as hath been ſo adjudged by the authority of canonicall Scriptures as by the four firſt generall Councells, or by any other generall Councell wherein the ſame was declared Hereſie by the expreſs and plain words of canonicall Scripture, or ſuch as ſhall hereafter be determined to be Hereſie by Parliament with the aſſent of the Convocation, for ſo it is expreſſly provided by the ſaid act, of 1 Eliz. And although this proviſo extends only to the high Commiſſioners, yet ſeeing in the high Commiſſion there be ſo many Biſhops and other Divines and learned men, it may ſerve for a good direction to others, eſpecially to the Dioceſan being a ſole Judge in ſo weighty a cauſe.

At this day the Dioceſan hath juriſdiction of Hereſie, and ſo it hath been put in ure in all Queen Elizabeths Reign, but without the aid of the Act of 2 H.4. cap. 15. the Dioceſan could impriſon no perſon accuſed of Hereſie but was to proceed againſt him by the cenſures of the Church: for the Biſhop of every dioceſs might convict any for Hereſie before the Statute 2 H.4. as appeares by ỳ preamble of it. But could not impriſon, &c. & now ſeeing that not onely ỳ ſaid Act of 2 H.4. but 25 H.8. cap. 14. are repealed, the dioceſan cannot impriſon any man accuſed of Hereſie, but muſt proceed againſt them as he might have done before thoſe Statutes by the cenſures of the Church; as it appears by the ſaid act of 2 H.4. cap. 15. Likewiſe the ſuppoſed Statute of 5 Rich. 2. cap. 5. and the Statutes of 2 H. 5. cap. 7. 25 H.8. cap. 14. 1. and 2. P. and M. cap. 6. are all repealed ſo as no Statute made againſt Heretiques ſtands now in force, and at this day no perſon can be indicted or impeached for Hereſie before any temporall Judge or other that hath temporall juriſdiction, as upon peruſall of the ſaid Statute appeareth.

There was a Statute ſuppoſed to be made in 5 R. 2. that Commiſſions ſhould be by the Lord Chancellor made, and directed to Sheriffs, and others to arreſt ſuch as ſhould be certified into the Chancery by the Biſhops and Prelates, Maſters of Divinity, to be Preachers of Hereſies, and notorious errors, their Factors, Maintainers, and Abetters, and to hold them in ſtrong Priſon, untill they will juſtifie themſelves to the Law of the Holy Church. By colour of this ſuppoſed Act, certain Perſons that held, that Images were not to be Worſhipped, &c. were holden in ſtrong Priſon, untill they (to redeem their veration) miſerably yielded before theſe Maſters of Divinity to take an Oath, and did ſwear to Worſhip Images, which was againſt the Moral and Eternall Law of Almighty God. We have ſaid by colour of the ſaid ſuppoſed Statute, &c. not only in reſpect of the ſaid Opinion, but in reſpect alſo, that the ſaid ſuppoſed Act, was in truth never any Act of Parliament, though it was entred in the Rolls of the Parliament for that the Commons never gave their conſent thereunto. And therefore, in the nert Parliament, though it was entred in the Rolls of the Parliament for that the Commons never gave their conſent thereunto, therefore in the nert Parliament, the Commons preferred a Bill reciting the ſaid ſuppoſed Act and conſtantly affirmed, that they never aſſented thereunto, and therefore deſired that the ſaid ſuppoſed Statute might be anienled, and declared to be void: for they proteſted, that it was never their intent to be juſtified, and to bind themſelves and Succeſſors

to the Prelates, more then their Anceſtors had done in times paſt, and hereunto the King gave Royall aſſent in theſe Words, Leiſt an Roy. And marke well the manner of the Penning of the Act, for ſeeing the Commons did not aſſent thereunto, the Words of the Act be, It is Ordained and aſſented in this preſent Parliament, that, &c. And ſo it was, being but by the King and the Lords.

It is to be known, that of Ancient time, when any Acts of Parliament were made to the end the ſame might be publiſhed, and underſtood, eſpecially before the uſe of Printing came into England, the Acts of Parliament were ingroſſed into Parchment and bundled up together with a Writ in the Kings Name, under the great Seal to the Sheriff of every County, ſometime in Latine, and ſometime in French, to command the Sheriff to proclaime the ſaid Statutes within his Bayliwicke, as well within Liberties as without. And this was the courſe of Parliamentary proceedings, before Printing came in uſe in England, and yet it continued after we had the Print, till the Reign of H. 7.

Now at the Parliament holden in 5 R. 2. John Braibrooke, Biſhop of London being Lord Chancellor of England, cauſed the ſaid Ordinance of the King and Lords to be inſerted into the Parliamentary Writ of Proclamation to be Proclaimed amongſt the Acts of Parliament, which Writ I have ſeen, the purcloſe of which Writ, after the Recital of the Acts directed to the Sheriff of N. in theſe Words. Nos volentes dictas Concordias, ſive Ordinationes in omnibus et ſingulis ſuis Articulis inviolabiliter obſervari, tibi præcipimus quod prædictas Concordias ſive Ordinationes in Locis infra balivam tuam, ubi melius expedire volueris, tam infra Libertates, quam Extra, publice proclamari et teneri facias juxta formam prænotatam. Teſte Rege apud Weſtm. 26 Maii Anno Regni Regis, R. 2. 5.

But in the Parliamentary Proclamation of the Acts paſſed in Anno, 6 R. 2. the ſaid Act of 6 R. 2. whereby the ſaid ſuppoſed Act of 5 R. 2. was declared to be void, is omitted, and afterwards the ſaid ſuppoſed Act of 5 R. 2. was continually Printed, and the ſaid Act of 6 R. 2. hath by the Prelates been even from time to time kept from the Print.

Certain Men called Lollards were indicted for Hereſie upon the ſaid Statute of 2 H. 4. for theſe Opinions, Viz. Quod non eſt Meritorium ad Sanctum Thomam nec ad Sanctam Mariam de Walſingham peregrinari. 2. Nec Imagines Crucifixi & aliorum Sanctorum adorare. 3. Nulli Sacerdoti Confiteri niſi ſoli Deo, & c. Which Opinions were ſo farre from Hereſie, as the makers of the Statute of 1 Eliz. had great cauſe to limit, what Hereſie was.

Mich. 6. Iac. Regis.

Prohibition. IN the caſe of Langdale in this very Term, in a Prohibition to the high Commiſſioners, two points were moved; The one, if a Feme-covert may ſue for Alimony before the high Commiſſioners. The other, if the Court of Common Pleas may grant a Prohibition, when no Plea is pendent in the Common Pleas: As in this caſe no Plea can there depend betwixt Husband and Wife. And foraſmuch as this concernes the Juriſdiction of the Court, this was firſt of all debated, divers objections were made againſt it.

1. That this Court hath not Juriſdiction to hold Plea without an Originall

rigtnall, unleſſe it be by privileage of an Attorney, Officer, or Clark of the Court, unleſſe that it be in an eſpeciall caſe, viz. when there is an Action there depending for the ſame cauſe; then it was agreed that a Prohibition ſhall be awarded out of the Common Pleas, in reſpect that the Court hath an action there depending for the ſame cauſe, and ſo being poſſeſſed of the cauſe, it gave the Court Juriſdiction to award Prohibition out of the ſame Court: And for that the Prohibition ought to recite, Quod cum tale placitum pendet, &c. and the Defendant Pendente placito prædicto, hath purſued in Court Chriſtian: And with this accords, F.N.B. 43. g. where it is ſaid, that if a man be ſued in the Common Pleas for a Treſpaſs, if the Plaintiff alſo ſue in Court Chriſtian for the ſame cauſe, the Defendant may ſhew this in the Common Pleas, and ſhall have a Prohibition then directed to the Judges: And ſo alwayes when the matter is pendent in the Common Pleas, if ſuit be for the ſame cauſe in Court Chriſtian, he ſhall have a Prohibition: But a man ſhall have a Prohibition out of the Chancery, or Kings Bench upon his ſurmiſe, ſurmiſing that he is ſued in Court Chriſtian for a Temporall cauſe: And 2 Ed. 4. 11. 6. was cited, where it is held that Ne admittas, which is a Prohibition, doth not lye unleſſe that the Quare impedit be pendent.

But it was anſwered and reſolved by Coke chief Juſtice, Warberton, Daniel, and Foſter, Juſtices, that the Common Pleas may award a Prohibition, although that no Suit be there pendent, for this, that the Common Pleas is the principall Court of common Law for common Pleas: For it belongs to the Juriſdiction of the common Pleas to determine all common Pleas.

Communia placita non ſequantur Curiam noſtram, as it is enacted by Magna Charta, which hath thirty two times been confirmed by other acts of Parliament: Then if the Eccleſiaſticall Judges incroach upon the Juriſdiction of the common Pleas to hold Plea of any thing againſt the common Law of the Land, or of any thing triable by the Law, there the Principal Court of common Law ſhall graant a Prohibition, and that without Originall Writ, for divers cauſes.

1. For that no Originall Writ of Prohibition which iſſues out of the Chancery is returnable either into the Kings Bench or common Pleas but is directed to Judge, or party, or both, and is not returnable at all: But it appears in the Regiſter, that if the Prohibition be contemned, then the Chancellor may award an Attachment to punith this contempt, returnable either in the common Pleas, or in the Kings Bench: But an Attachment in ſuch caſe is but as a Judiciall Writ; And this appears by the Regiſter, fol. 33. And if the Attachment in ſuch caſe be returnable into the common Pleas, &c. the Plaintiff in the Declaration ſhall make mention of an Original Writ in the Chancery, and of the contempt, &c.

2. There was great reaſon that no Originall Writ of Prohibition ſhall be returnable, for the common Law was a Prohibition in it ſelfe, and he who did incroach upon the Juriſdiction of it incurred a contempt: And with this agrees our Bookes, as 9 H. 6. 56. in Attachment upon a Prohibition in the common Pleas, before William Babington then chief Juſtice of the Bench, concerning a Suit in Court Chriſtian of tythes of groſs Trees: And there Fulthorp the Serjeant took exception to the Count, for this, that the Plaintiff in his Count did not declare upon any Statute, nor that any Prohibition, Scil. Original Writ, was directed unto him: And there it is held that the Statute of 45 Edward 3. and the common Law alſo was a Prohibition in it ſelfe: And thus the Rule of the Booke, 19 H. 6. 54. Prohibition, for this, that one had ſued in a Court Baron againſt the common Law;

And

And there Aſcue ſaid, the Statute is a Prohibition in it ſelfe, ſo is it held in 8 R. 2. Title Attachment ſur Prohibition, 15. Note by Clopton in the common Pleas, who then was a Serjeant, that if a Plea be held in Court Chriſtian, which belongs to the Court of the King, without any Prohibition in facto, the Plaintiff ſhall have an Attachment upon a Prohibition, for this, that the Law is a Prohibition in it ſelf, for by the Law they ought to hold no Plea, but that which doth belong to their Juriſdiction, Quod fuit conceſſum, &c. Regiſter 77. Eſtrepment. Præcipimus quod inhibeas, &c. Fitz. N. B. 259. Regiſter 112. Superſedeas to a Court Baron, for holding Plea Vi & armis, for above forty ſhillings: And F. N. B. a Writ of Conſultation is as much an Originall as a Prohibition, yet the Common Pleas hath granted infinite Conſultations, ergo Prohibitions, Qui habet juriſdictionem abſolvendi, habet juriſdictionem ligandi: And one Writ is as Original as the other

Note, there are ſeverall Writs of Expreſſe Prohibitions, Scil. Prohibitions with this word Prohibemus vobis, and Letters in nature of Prohibitions, as Superſedeas, by which it is commanded, Quod ſuperſed. in placito prædicto. And Injunction is a Prohibition, alſo in its nature, for the words are an Injunction to the party, not to the Judge; and a Superſedeas is to an Officer or Judge, not to the party.

Expreſs Prohibitions are in two manners, the one founded upon a Suggeſtion, the other upon Record; upon Suggeſtion where no Plea is pendent, but the Suggeſtion is the Foundation, for it is not ſo when a Plea is pendent; upon record when a Plea is pendent, Prohibitions founded upon Record as, Ne admittas, &c. ought to recite the Plea pendent, for all thoſe which are founded upon Record ought to recite a plea pendent. So a Writ to the Biſhop to admit a Clarke, is a Judiciall Laitat, as Dyer defends it: And as to the Booke of 2 Edw. 4. it is well agreed, that this doth not lye in the Common Pleas, unleſſe a Quare impedit be depending, for this ought to recite a Writ to be depending; and it ſhould be againſt reaſon to reſtraine any to preſent, or to make Waſte by Eſtrepment, unleſſe that a Writ be pendent: And as to the Opinion of Fitzherbert, it was affirmed for good Law, for every one agrees it, that if a Plea be pendent in the Common Pleas, then a Prohibition there lyes, and the pendency or not pendency of a plea is not materiall for divers cauſes.

1. The pendency of a Plea may give a priviledge to the party, but no Juriſdiction to the Court in collaterall Suit: And there is a diverſity betwixt priviledge to the party, and Juriſdiction of Court, for a Plea pendent may give priviledge to the party, Eundo, redeundo & morando, but doth not give Juriſdiction to the Court to hold Plea by Bill by collaterall Suit againſt any other, as an Officer, Attorney or Clerk may.

2. The Prohibition in ſuch a caſe where Plea is pendent is no proceſſe Judiciall upon the Record, for it is a collateral Suit.

3. If the common Pleas, which is the proper Court for common Pleas, cannot grant a Prohibition without a Plea pendent; certainely the Kings Bench, which holds Plea of common Pleas, by ſecondary meanes, cannot do it: And ſo the Arch-biſhop of Canterbury in his Articles concerning Prohibitions, holds, that neither the one Court nor the other may grant Prohibitions in ſuch a caſe: But inaſmuch as the common Law is inſtead of an Original, as hath been ſaid, both Courts may grant it.

4. Infinite Preſidents may be ſhewn of Prohibitions out of the Common Pleas, without recitall of any plea pendent, as is agreed on the other part. And true it is, that it ought not to be ſo, if the Court hath not Juriſdiction

to

to grant any without plea pendent. Every petty Clerk of the Common Law ſhall have by his priviledge a prohibition without plea pendent: a fortiori, the common Law it ſelfe may prohibite any one, who againſt the common Law ſhall incroach upon its Juriſdiction, and enquire of things done againſt the Juriſdiction of the Court. Plea pendent is cauſe of priviledge and not of Juriſdiction, 4 Ed. 4. 37, 37 H. 8. 4. Action or information upon the Statute of 2 H. 5. cap. 5. is but an information to the Court of wrong done to the common Law, for this, that no Originall Writ lyes, as upon penall Law, upon Malum prohibitum, this is Malum in ſe, de quo Curia intelligi & informari voluit.

5. A Preſident is in 22 Ed. 4. where a Prohibition was granted out of the Common Pleas, for that the Plaintiff might have a Writ of falſe Judgment at the Common Law: The Record it ſelfe agrees with the Report,

6. Officers and Clerks, as well in the Common Pleas, as in the Exchequer, and Farmers of the King in the Exchequer, may have by priviledge of Court a Prohibition without Originall; a fortiori, the Law it ſelf ſhall have greater priviledge then an Officer or Clerke, and certainly to enforce the party to bring an action, will be a meanes to multiply Suits to no end, for the Law it ſelf in 4 Ed. 4. fol. 37. if any man upon the Statute of 2 H. 5. for not delivering of a Libell, be brought into the Common Pleas: And if he cannot have a Prohibition without ſuch Suit this ſhall be a cauſe, as hath been ſaid, to multiply Suits, and is againſt the publick Weale: For he will bring his action upon the Statute before that he will be deprived of his Prohibition, and by that he gives himſelfe cauſe of Prohibition; every Prohibition is as well at the Suit of the King as of the party, as is held in 28 Ed. 3. 97. falſe Latine ſhall not abate, nor excommunication in the plaint is no plea: For this is the Suit of the King, as well for his Juriſdiction as for the party, who by Law may chooſe his Court, 15 Ed. 3. title Corrody 4. The King may ſue for this contempt where he plea ſeth.

Note, that although the Originall cauſe was in the Kings Bench for Corrody, Excommunication is no plea in diſability of the Plaintiff, becauſe it is the Suit of the King for contempt to his Law, vide 21 H. 7. 71. Kelway 6. in. quare non admiſit. 4 Ed. 4. 37. for not delivery of a Libell in the Common Pleas, and then he ſhall have a Prohibition by all the Juſtices: So upon the Statute of 2 Ed. 6. cap. 13. for ſuing for Tythes where there is a preſcription, &c. And this ſhall be to introduce multiplication of Suits, when himſelfe gives cauſe of Prohibition. 38 H. 6. 14. 22 Ed. 4. 20. 13 Ed. 3. title Prohibition. 11. after a Judgment in the Common Pleas, after which the Patrone ſues the Recoverer in Chancery, ſurmiſing equity, Attachment upon a Prohibition out of the Common Pleas, yet no Plea pendent.

Note, the Reporter reporteth this Attachment to iſſue out of the Common Pleas, for the Chancellor would not Prohibite him.

32 H. 6. 34. An Attorney in the Palace aſſaulted and menaced, the Court ſhall take a Bill and enquire of it, 4 Ed. 4. 36, 37. there a Prohibition without view of Libell, for this, that action was pendent, Statham Prohibition 3.

Prohibition ſuper Articulos, title Prohibition plea 5. gives a Prohibition before, ſcil. Coram Juſticiariis noſtris apud VVeſt. vide F. N. B. fol. 69. b. in a Writ of Pone, Regiſter indic. coram Judiciariis noſtris apud VVeſt. is the common Pleas. F. N. B. 64. d. 38 Ed. 3. 14. Statute 2. Ed. 6. cap. 13. ſuch Courts grant Prohibition who have uſed to grant them: Hales caſe in

my Reports. Note, the reaſon that many Prohibitions were granted in the Kings Bench, for that no Writ of Error lyes but in Plaint.

Mich. 6. Jac.

Sur Statute de Winton.

MIch. 6. Jac. Rot. 639. Robert Bancks Gent, brought an Action upon the Statute of VVinton 13 Ed. 1. againſt the Inhabitants of the hundred of Burnham, in the County of Bucks, and counted, that certain Miſdoers to the Plaintiff unknown, at Hitcham in the County aforeſaid, which Town is in the Hundred of Burnham, the 22 Novemb. An. Regni Regis Jacobi. 5. aſſaulted the Plaintiff, and robbed him of 25 l. 3s. 2d. ob. and that the Plaintiff immediately after the Robbery, ſcil. the 22. of November at Joplow and Manlow, in the County aforeſaid, which were Towns next the ſaid Town of Hitcham, within the ſaid hundred, made Hue and Cry of the ſaid Robbery, and gave notice of the ſaid Robbery to the Inhabitants of the ſaid Townes of Joplow and Manlow, and after the ſaid Robbery, and within twenty dayes before the purchaſe of the Writ, ſcil. 19. day of February, Anno. 5. at Dorney in the County aforeſaid, the Plaintiff before Sir William Gerrard Knight, then Juſtice of peace within the ſame County, an Inhabitant next to the ſaid Hundred, being examined upon his Oath, according to the Statute of 27 Eliz. the Plaintiff upon his Oath ſaid, That he did not know the parties who did rob him, nor any of them: And ſince the ſaid Robbery are forty dayes paſt, and the Inhabitants of the ſaid Hundred of Burnham, have not made amends of the ſaid Robbery to the Plaintiff, nor the body of the Felons and Miſdoers aforeſaid, nor any of them have taken, nor anſwered their bodies, nor the bodies of any of them, but have ſuffered the Felons to eſcape, to which the Defendants plead (not guilty) and a Venire facias was awarded to the Sheriff, De viceneto of the Hundred of Stoke, which is the hundred next adjacent to the ſaid Hundred of Burnham: And the Jury gave a ſpeciall Verdict, they found that the Plaintiff was robbed, and that he made Hue and Cry in manner and form, as he hath counted, and found over, that the Plaintiff was ſworn before the ſaid Sir VVilliam Gerrard, then being a Juſtice of Peace within the ſame County, and an inhabitant next unto the Hundred of Burnham, and ſaid upon his Oath in theſe Engliſh words, That he, on Thurſday being the two and twentieth day of Novemb. 1608. riding under Hitcham Wood, in the Pariſh of Hitcham, within the hundred of Burnham, was then and there ſet upon by two Horſe-men, which then, nor at this preſent he did, nor doth know, and by them robbed and ſpoyled of his juſt Summe of 25 l. 3s. 2d. ob. not without great danger of his life: But whether the ſaid Oath ſo taken, is true, according to the forme and effect of the ſaid Act of 27 Eliz. and according to the Count, the Jurors pray the direction of the Court.

Mich.

Mich. 6. Jac.

IN an action of Treſpaſs brought by Mouſe, for a Caſket, and a hundred and thirteen pound, taken and carried away; the caſe was, The Ferry-man of Gravelend took forty ſeven Paſſengers into his Barge, to paſs to London, and Mouſe was one of them, and the Barge being upon the water, a great Tempeſt hapned, and a ſtrong wind, ſo that the Barge and all the Paſſengers were in danger to be Drowned, if a Hogſhead of VVine and other ponderous things were not caſt out, for the ſafeguard of the Lives of the Men: It was reſolved *Per totam Curiam*, that in a caſe of neceſſity, for the ſaving of the lives of the Paſſengers, it was lawfull to the Defendant being a Paſſenger to caſt the Casket of the Plaintiff out of the Barge, with the other things in it, for *Quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur*, to which the Defendant pleads all this ſpeciall matter; And the Plaintiff replyes, *De injuria ſua propria abſque tali cauſa*: And the firſt day of this Term, this Iſſue was tryed, and it was proved directly, that if the things had not been caſt out of the Barge, the Paſſengers had been drowned; and that *Levandi cauſa*, they were ejected, ſome by one Paſſenger and ſome by another; and upon this the Plaintiff was non-ſuit. Bonum publicum.

It was alſo reſolved, that although the Ferry-man ſur-charge the Barge, yet for ſafety of the lives of Paſſengers in ſuch a time and accident of neceſſity, it is lawfull for any Paſſenger to caſt the things out of the Barge: And the Owners ſhall have their remedy upon the ſur-charge againſt the Ferry-man, for the fault was in him upon the ſur-charge: but if no ſur-charge was, but the danger accrued only by the act of God; as by Tempeſt, no default being in the Ferry-man, every one ought to beare his loſſe for ſafeguard of the life of a Man, for *Intereſt Reipublicæ quod homines conſerventur*, 8 Ed. 4. 23. Bull, &c. 12 H. 8. 15. 28 H. 8. Dyer. 36. plucking down of a Houſe, in time of fire, &c. And this *Pro bono publico, & conſervatio vitæ hominis eſt bonum publicum*. So if a Tempeſt ariſe in the Sea, *Levandæ navis cauſa*, and for ſalvation of the lives of men, it may be lawfull for Paſſengers to caſt over the merchandizes, &c.

Mich. 5. Jac.

Prohibitions del Roy.

NOte, upon Sunday the tenth of November, in this ſame Terme, the King, upon complaint made to him by Bancroft Arch-biſhop of Canterbury, concerning Prohibitions, the King was informed, that when Queſtion was made of what matters the Eccleſiaſticall Judges have Cognizance, either upon the Expoſition of the Statutes concerning Tythes, or any other thing Eccleſiaſticall, or upon the Statute 1 Eliz. concerning the high Commiſſion, or in any other caſe in which there is not expreſſe Authority in Law, the King himſelfe may decide it in his Royall perſon; and that the Judges are but the Delegates of the King, and that the King may take what cauſes he ſhall pleaſe to determine, from the determination of the Judges, and may determine them himſelfe. And the Arch-biſhop ſaid, that this was cleer in Divinity, that ſuch Authority belongs to the King by the Word of God in the Scripture. To which it was anſwered by me, in the preſence, and with the cleer conſent of all the Juſtices of England and Barons of the Exchequer, that the King in his own perſon cannot

cannot adjudge any caſe, either criminall, as Treaſon, Felony, &c. or betwixt party and party, concerning his Inheritance, Chattels, or Goods, &c. but this ought to be determined and adjudged in ſome Court of Juſtice, according to the Law and Cuſtome of England, and alwayes Judgements are given, Ideo conſideratum eſt per Curiam, ſo that the Court gives the Judgement: And the King hath his Court, viz. in the upper Houſe of Parliament, in which he with his Lords is the ſupreame Judge over all other Judges; For if Error be in the Common Pleas, that may be reverſed in the Kings Bench: And if the Court of Kings Bench erre, that may be reverſed in the upper houſe of Parliament, by the King, with the aſſent of the Lords Spirituall and Temporall, without the Commons: And in this reſpect the King is called the Chief Juſtice, 20 H. 7. 7. a. by Brudnell: And it appears in our Books, that the King may ſit in the Star-chamber, but this was to conſult with the Juſtices, upon certain Queſtions propoſed to them, and not in Judicio; So in the Kings Bench he may ſit, but the Court gives the Judgment: And it is commonly ſaid in our Books, that the King is alwayes preſent in Court in the Judgement of Law; and upon this he cannot be non-ſuit: But the Judgements are alwayes given Per Curiam; and the Judges are ſworn to execute Juſtice according to Law and cuſtome of Englamd. And it appeares by the Act of Parliament, of 2 Ed. 3. cap. 9. 2 Ed. 3. cap. 1. That neither by the great Seale, nor by the little Seale, Juſtice ſhall be delayed; ergo, the King cannot take any cauſe out of any of his Courts, and give Judgment upon it himſelfe, but in his owne cauſe he may ſtay it, as it doth appeare, 11 H. 4. 8. And the Judges informed the King, that no King after the conqueſt aſſumed to himſelfe to give any Judgment in any cauſe whatſoever, which concerned the adminiſtration of Juſtice within this Realme, but theſe were ſolely determined in the Courts of Juſtice: And the King cannot arreſt any man, as the Book is in 1 H. 7. 4. for the party cannot have remedy againſt the King, ſo if the King give any Judgment, what remedy can the party have, vide 39 Ed. 3. 14. One who had a Judgment reverſed before the Councill of State: it was held utterly void, for that it was not a place where Judgment may be reverſed, vide 1 H. 7. 4. Huſſey chief Juſtice, who was Attorney to Ed. 4. reports, that Sir John Markham chief Juſtice ſaid to King Edw. 4. That the King cannot arreſt a man for ſuſpition of Treaſon or Felony, as other of his Leiges may; for that if it be a wrong to the party grieved, he can have no remedy: And it was greatly marvelled that the Arch-biſhop durſt informe the King, that ſuch abſolute power and authority as is aforeſaid, belonged to the King by the Word of God, vide 4. H. 4. cap. 22. which being tranſlated into Latine, the effect is, Judicia in Curia Regis reddita non annihilentur, ſed ſtet judicium in ſuo robore quouſq; per judicium Curiæ Regis tanquam erroneum, &c. vide V Veſt. 2 cap. 5. vide le Stat. de Marbridge. cap 1. Proviſum eſt, concordatum, & conceſſum, quod tam majores quam minores juſtitiam habeant & recipiant in Curia Domini Regis, & vide le Stat. de Mag. Charta. cap. 29. 25 Ed. 3. cap. 5. None may be taken by petition or ſuggeſtion made to our Lord the King or his Councill, unleſs by Judgement: And 43 Ed. 3. cap. 3. no man ſhall be put to anſwer without preſentment before the Juſtices, matter of Record, or by due Proceſſe, or by Writ Originall, according to the Ancient Law of the Land: And if any thing be done againſt it, it ſhall be void in Law and held for Error, vide 28 Ed. 3. cap. 3. 37 Ed. 3. cap. 18. vide 17 R. 2. ex rotulis Parliamenti in Turri act 10. A controverſie of Land between parties was heard by the King, and ſentence given, which was repealed, for this, that it did belong to the common Law: Then the King ſaid, that he thought the Law

2 R. 3. 9. 21. H. 7. 8.

17 H. 6. 14. 39 Ed. 3. 14.

Law was founded upon reaſon, and that he and others had reaſon, as well as the Judges: To which it was anſwered by me, that true it was, that God had endowed his Majeſty with excellent Science and great endowments of nature, but his Majeſty was not learned in the Lawes of his Realm of England, and cauſes which concerne the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reaſon, but by the artificiall reaſon and judgment of Law, which Law is an act which requires long ſtudy and experience, before that a man can attain to the cognizance of it; And that the Law was the golden met-wand and meaſure to try the Cauſes of the Subjects; and which protected his Majeſty in ſafety and peace: With which the King was greatly offended, and ſaid, that then he ſhould be under the Law, which was Treaſon to affirm, as he ſaid; To which I ſaid, that Bracton ſaith, Quod Rex non debet eſſe ſub homine, ſed ſub Deo & Lege.

Mich. 8. Iac. Regis.

Court Eccleſiaſticall. Prohibition.

IN this Term, in the caſe of one Roberts, a Prohibition had been granted in a caſe of ſubſtraction of Tythes, upon ſurmiſe that the Plantiff being Defendant in the Spirituall Court, had but one Witneſſe in that Court to prove his Demiſe; to which that Court ſaid, that Singularis teſtis is not allowable: And upon conſideration and ſight of a Prohibition granted upon the ſame cauſe in Hill. 3 Eliz. in banco Regis, it was reſolved by Coke chief Juſtice, Et totam Curiam in communi banco, that conſultation ſhould be granted, and that for divers cauſes.

1. It appears by the Regiſter fol. 5. that it is put for a rule, Quod non eſt conſonum rationi, quod cognitio acceſſorij in Curia Chriſtianitatis impediatur, ubi cognitio cauſæ principalis ad forum Eccleſiaſticum noſcitur pertinere: And with this agrees 1 R. 3. 4.

2. If ſuch a Surmiſe ſhall be allowed, then in every caſe for meer delay ſuch a Surmiſe may be made; for he who was Plaintiff in the Spirituall Court cannot deny, that where it is ſurmiſed that he hath one Witneſſe, that he hath two, or more, for then he affirms matter againſt himſelf: And when the Spirituall Court hath Juriſdiction of the principal Cauſe, they determine the acceſſory. But it was objected, that if A. claiming a Leaſe by B. of a Rectory, Libels for ſubſtraction of Tythes, and the Defendant pleads a former Leaſe made by B. and C. and the Defendant hath but one Witneſſe in the caſe to prove the former Leaſe, if no Prohibition ſhall be granted, the Defendant ſhall be charged: And if C. ſue him upon the Statute of 2 Ed. 6. at the Common Law, the teſtimony of one only, will there be ſufficient, and ſo he ſhall be twice charged: To which it was anſwered, that firſt the fault was the Defendant's, that he would not ſet forth his Tythes, and then he ſhall be charged whoſoever takes them: But in ſuch a caſe, thoſe of the Eccleſiaſticall Court will upon one good Witneſſe, and any concurrent vehement preſumption, as poſſeſſion, or the like, allow of ſuch a proof: And the teſtimony of Witneſſe in our Law is no concluſive evidence, but ought to be left to the conſcience of the Jury, and ſo the validity or invalidity of proof of matters of Fact ſhall be left to them; but if a queſtion of the Common Law ariſe from the party upon the conſtruction of a Statute, or the like, and thoſe of the Eccleſiaſticall Court will take upon them to judge of it againſt the rule of Law,

there upon ſpeciall ſurmiſe of it; And upon the ſhewing of the anſwer or other pleadings of the parties, by which it appears to the Court, that ſuch ſurmiſe is a good ground, a Prohibition lies: for matter in Law, ariſing upon Eſtates or Intereſts done by the Common Law and conſtruction of Statutes, ought to be determined according to the rules of Common Law, Et non debet trahi ad aliud examen.

And Coke chief Juſtice cited a notable Judgment, Paſch. 35. Eliz. in banke le Roy. Fuller brought a Prohibition againſt Clements and Wiſkard; and Fuller counted that he himſelf was Owner of the Rectory of Longham in the County of Norfolk, and libelled againſt Clements one of the Defendants, before the Officiall of the Biſhop of Norwich, for ſubſtraction of Tythes, ſcil. of Wheat, &c. pendent which Suit, the ſaid Wiskard, intervening Pro intereſſe ſuo, made theſe Allegations againſt the ſaid Fuller.

1. That the ſaid Rectory was impropriate to the Monaſtery of VVendling, and by the diſſolution of the ſaid Monaſtery, came to the hands of H. 8. and did convey it by Realn diſcent to Queen Eliz. who by her Letters Patents of concealment granted it to Min, and Hall, who enfeoffed Bozome, who did let it to Wiskard for four years, and proved his Allegations by Witneſſes, upon which in fine, ſentence was given againſt Fuller, and eight pounds ten ſhillings given to Clements for coſts, and thirteen pounds ſix ſhillings to Wiskard: And after Fuller did appeal to the Court of the Arches, and there Fuller clamed the ſaid Rectory by reaſon that Hall was ſeiſed of it, and by his Deed gave and granted the ſaid Rectory, and all Lands and Tythes to it appertaining, to Sir Edward Clere, before the Feoffment ſuppoſed to be made to Bozome: And that Sir Edward Clere by his Deed did enfeoff Fuller; and although that he offered to prove the delivery of the Deed of the ſaid Feoffment made to Sir Edward Clere by one ſole Witneſſe, the Eccleſiaſticall Court would not allow it, without producing another Witneſſe: And Fuller further ſaid, that although he had further alledged there, that theſe were matters determinable at the Common Law, notwithſtanding they gave ſentence: the Defendants for to have a Conſultation pleaded, that Fuller in the ſaid Court of the Arches proved the Delivery of the Deed aforeſaid, by Sir Edward Clere and Mouſe, but could not prove Livery and Seiſin according to the Deed: And for this cauſe ſentence was given, without that the Judges of the Arches would not admit the ſaid proof, unleſſe he proved the Deed by other Witneſſes, upon which Fuller demurred in Law; and it was objected by the Councell of Fuller,

1. That Wiskard, who is a meer ſtranger to the Suit, and who comes in Pro intereſſe ſuo in ſaid Rectory, pleads matter meerly determinable at the Common Law, ſcil. Letters Patents, Feoffment, and Leaſe for years; And on the other part Fuller claimes an Eſtate in the ſaid Rectory, by conveyance at the Common Law. And now the queſtion in the Eccleſiaſticall Court being only who hath the beſt Eſtate in the ſaid Rectory by the Common Law this ought to be tryed by the Common Law, and not in the Eccleſiaſtical Court, for this is the birth-right of the Subject to have his Inheritance and Free-hold tryed and determined by Common Law; for the Civill Law differs much in deciding of Inheritances.

2. It was objected, that all matters in Law ought to be determined by the Judges of the Law, and in this caſe matters of Law ariſing, ſcil. If a man hath a Rectory Impropriate, which conſiſts in Glebe and Tythes, and by his Deed gives and grants the ſaid Rectory, and all Lands and Tythes any way belonging or appertaining to it, to another and his heirs,

and

and no Liverie is made in this caſe, if the Tythes ſhall paſſe, or no, for that Tythes may paſſe without any Livery: This queſtion is not fit to be determined by the Eccleſiaſticall Judges, but by the Judges of the Common Law, Quod quiſque novit, in hoc ſe exerceat.

3. It was objected, that VViskard was a meer ſtranger to the Suit, and all his Allegation is temporall, and for that it is a ſtronger caſe to maintain a Prohibition, for almuch as betwixt him and Fuller nothing is in queſtion, but to whom the Inheritance of the Rectory belongs; But Clements, who is ſued for ſubſtraction of Tythes, hath greater colour in his defence, being lawfully ſued in the Eccleſiaſticall Court, than for Wiskard, who is no party to the Suit for any Eccleſiaſticall cauſe, but all his Allegation, as hath been ſaid, is temporal.

4. It was objected, that Fuller had but one Witneſſe to prove the delivery of the Deed; and in the Eccleſiaſticall Law, Unus teſtis, eſt nullus teſtis: For all which cauſes it was prayed that the Prohibition may ſtand, and that no conſultation may be granted.

To which it was anſwered and reſolved by Sir Chriſtopher Wray cheif Juſtice, and Per totam Curiam,

1. That to the firſt Objection, for that the Originall belongs to the Eccleſiaſticall Court, the determination of all that which depends upon it belongs to the Judges of the ſame Court, although that the matter be tryable by the common Law: but where the Originall matter belongs to the Common Law, and there commenced, and iſſue be taken upon matter tryable by the Eccleſiaſtical Law, there the Judges of our Law ſhall write to the Judges of the Eccleſiaſticall Court to try it, and to certifie: and the reaſon of this diverſity is, that our Judges having authority to write and command them by the Kings Writ to certifie them, but they cannot write to the Judges of our Law to try any thing, and to certifie them, for they have no ſuch authority to command by Writ, but to obey the Writs of the King: As in any action Anceſtrall, if Baſtardy be pleaded in the Demandant, and upon this iſſue is joyned, this ſhall be tryed by the Biſhop, and his certificate ſhall bind: ſo in a Quare impedit, if iſſue be taken, whether a Clerk, which was preſented was able, or not able, this ſhall be tryed by examination of a Clerk, and certified by the Biſhop: but although that ſuch iſſues are in their nature tryable by the Eccleſiaſticall Law, yet if the caſe was ſuch, that the Eccleſiaſticall Court could not try it, then (to the end that Juſtice ſhall not be wanting) ſuch Eccleſiaſticall matter ſhall be tryed by the Common Law, as 4 Ed. 3. 26. if the Preſentee be dead, if he was able, or not able, ſhall be tryed Per paijs; for the Biſhop cannot try it: But againſt this was objected the Statute de Articulis Cleri cap. 13. by which it is provided, Quod de idoneitate Perſonæ perſonatæ ad beneficium Eccleſiaſticum, pertineat examinatio ad Judicem Eccleſiaſticum: upon which it was concluded, that the tryall De idoneitate perſonæ, in all caſes belongs to Court Chriſtian. To which it was anſwered and reſolved, that true it is, that the tryall of ability belongs to them; but the Statute explains it in what manner it ſhall be made, for the Statute ſaith, Pertinet examinatio ad Judicem Eccleſiaſticum, ſo that this tryall ought to be by examination of the party, and this cannot be when the Preſentee is dead: And although he be not party to the Writ, yet he may be examined; And with this agrees 39 Ed. 3. 2, The Earl of Arundel's caſe, and 4 Ed. 3. 25. 16 Eliz. Dyer 327. So if Baſtardy be alledged in one who is not party to the Writ, there, for this, that the Certificate binds for ever, it ſhould be againſt Law and reaſon that he ſhould not be party to the Certificate; for this cauſe in ſuch caſe it ſhall be tryed Per paijs,

paijs, and if any difficulty ariſeth upon it, the Judges of our Law uſe to conſult with the Judges Eccleſiaſtical: and with this accords 4 Ed. 3. 37. The ſame Law of profeſſion, 42 Ed. 3. 8. So if Baſtardy be alledged in one who is dead, vide 17 Ed. 3.5. where Baſtardy is alledged in the Tenent and one who is a ſtranger to the Writ, who are Sitters, vide, 32 Ed. 3. tryall 59. where the Tenent alledgeth Baſtardy in himſelf, and the Demandant doth aver him Mulier, vide 29 Aſſ. pl: 14. 6 Eliz: Dy: 226. 228. If the Iſſue be Quod vacavit per reſignationem, part of which is temporall and part ſpirituall, this ſhall be tryed Per paijs, vide 9 H. 7. Profeſſion and the time of it, &c. But admiſſion and inſtitution, although that it be alledged in a ſtrainger to the Writ, yet this ſhall be tryed by the Ordinary; as it appears 7 Ed. 6. 78. 6. in Dyer, for admiſſion, Inſtitution, Reſignation, Et ſimilia, are judiciall acts, and remain in their Courts and Regiſter, upon which they ground their Certificate, otherwiſe it is of Baſtardy, Idoneity, &c. By which it appears, that in divers caſes the Judges of the Common Law write to the Eccleſiaſticall Judges, commanding them to certifie ſome thing put in iſſue; and the Judges of our Law prohibite the Judges Eccleſiaſtical to hold Plea of ſome things which are determinable at Common Law: But the Court Eccleſiaſtical hath not power to write to our Judges, or to command them, or to prohibite them when they hold Plea of things determinable by the Eccleſiaſtical Judges; but this is erroneous, and ſhall be reverſed by Error. And of the other ſide, if in the Eccleſiaſtical Court the Suit is for a Legacy, and the Defendant plead a Releaſe, if in the admitting or rejecting of proofs concerning this Releaſe, which is matter determinable at Common Law, they do wrong to the Plaintiff or Defendant, they have no remedy but by way of appeal.

2. To the ſecond it was anſwered and reſolved, that if upon Conſultation with men learned in the Law, they give ſentence according to Law, this is well done, and no Prohibition ought to be granted; but if they take upon them to draw the Intereſt of any man, Ad aliud examen, and to judge againſt the Rule of Law, concerning the Inheritance or Intereſt of any, there Prohibition lies: And in the caſe at the Bar, they well reſolved the Law, for by the ſaid Livery of the Charter the Tythes do not paſſe as in groſſe, for this, that the intention of the parties was to paſſe the entire Rectory by Feoffment, and not to paſſe the Tythes by the ſame, and ſo to diſmember the Rectory by Fractions, and that by conſtruction of Law, againſt the intention of the parties.

3. As to the third, it was anſwered and reſolved, that by the Eccleſiaſtical Law, a ſtranger may come in Pro intereſſe ſuo; And when they have juriſdiction of the Originall cauſe of the Suit, we ought not to draw in queſtion their order and proceeding, but if they proceed inverſo ordine, or not obſerving form, this ought to be redreſſed by appeale: And although that the matter depending upon the Originall cauſe be determinable by the Common Law, yet it ſhall be determined, as it hath been ſaid, in the Eccleſiaſtical Court.

4. As to the fourth objection, it was anſwered and reſolved, that ſuch a Surmiſe, that he hath but one Witneſſe, is not ſufficient to have a Prohibition, for this, that the Eccleſiaſtical Court hath Juriſdiction of the Principle, and if ſuch a Surmiſe ſhall be ſufficient, all Suits in the Eccleſiaſticall Court ſhall be either delayed, or quite taken away, for ſuch a Surmiſe may be made in every caſe; and the Plaintiff in the Eccleſiaſtical Court cannot have any good anſwer to it to have a Conſultation which agrees with the reſolution in the principle Caſe, &c.

It

It was resolved, upon evidence, by Coke chief Justice De banco, inter I. S. who informed upon the Statute of Usury, and Smith, that the parties to the supposed usurious Contract shall not be admitted Witnesses, for this, that upon the matter they were Testes in propria causa, and by their Oath shall avoid their Bond, &c. or shall be revenged on him who lent them the money, before they are enforced to repay it: And for the most part they incite, and raise up one of their own Servants, to informe and have part of the thing recovered.

High Commissioners.

Trin. 8. Jacobi Regis.

UPon a Habeas Corpus by Eliz. Lady Throgmorton, Prisoner in the Fleet, the return was, the Lady Throgmorton was committed by George Bishop of London and others Ecclesiasticall Commissioners, under their hands, till further order should be taken for her enlargement: And the cause of commitment of her was, for that she had done many evill offices betwixt Sir James Scudamore, and her Daughter the Lady Scudamore, Wife of the said James, and to make separation betwixt them, and detained her from her Husband: And upon her departure after sentence before the Commissioners, for divers contemptuous words against the Court, saying, that she neither had Law nor Justice there: And it was resolved, that for detaining of the Wife, and endeavouring to make separation, no Suit can be before the high Commissioners, for that it is not any enormous offence within the meaning of the Act.

2. For the detaining of the Wife, there is remedy by the Common Law.

3. VVithout Question, for such an Offence they cannot Imprison the VVife.

4. By the words it doth not appear, that they were spoken in the Court.

Secondly, It is no Court of Record, for that they proceed according to the Civill Law, and it is like the Admiralty Court; and for this they cannot Imprison, for none shall be committed for misdemeanour in Court, unless that the Court be of Record.

5. It doth not appear by the return what Court this was, which is uncertain; And upon this, upon good consideration she was bayled.

But Randall and Hickins was this very Term committed by the high Commissioners, for that they were vehemently suspected to be Brownists, &c. And they obtained a Habeas Corpus, and were remanded for this, that the high Commissioners have power to commit for Heresie. *Quere.*

The Lord of Aburgavenie's *Caſe.*

The Writ doth not make a Peer, &c.

IN the Parliament a Queſtion was made by the Lord of Northampton, Lord Priby Seale, in the Upper houſe of Parliament: That one Edward Nevil, the father of Edward Nevil, Lord of Aburgaveny, which now is, in the 2, and 3. of Queen MARY, was called by Writ to Parliament, and dyed before the Parliament: If he was a Baron, or no, and ſo ought to be named, was the Queſtion. And it was reſolved by the LORD Chancellor, the two chief Juſtices, chief BARON, and divers other Juſtices there preſent, that the direction and delivery of the Writ did not make a Baron or Noble, untill he did come to the Parliament, and there ſit, according to the commandment of the Writ; for untill that, the Writ did not take its effect, and the words of the Writ were well penned, which are, Rex & Regina, &c. Edwardo Nevil de Aburgaveney Chivalier, Quia de adviſamento & aſſenſu concilii noſtri pro quibuſdam arduis, & urgentibus negotiis ſtatum & defenſionem Regni noſtri Angliæ concernentibus, quoddam Parliamentum noſtrum apud VVeſtmonaſterium, 21. die Octobris proximo futuro teneri ordinavimus, & ibidem vobiſcum, ac cum Prelatis, Magnatibus et Proceribus dicti regni noſtri colloquium habere & tractatum: Vobis in fide & Ligeantia, quibus nobis tenemini, firmiter jungendo mandamus, quod conſideratis dictorum negotiorum arduitate & periculis iminentibus, ceſſante excuſatione quacunque, dictis die & loco perſonaliter interſitis nobiſcum, ac cum Prælatis, Magnatibus ac Proceribus ſupradictis, ſuper dictis negotiis tractaturis, veſtrumque conſilium impenſur. & hoc ſicut nobis, &c. And in the 35 H. 6. 46. and other Books, he is called a Peer of Parliament, the which he cannot be untill he ſit in Parliament, and he cannot be of the Parliament untill the Parliament begin: And foraſmuch as he hath been made a Peere of Parliament by Writ (by which implicitly he is a Baron) the Writ hath not its operation and effect, untill he ſit in Parliament, there to conſult with the King and the other Nobles of the Realm; which command of the King by his Superſedeas may be countermanded, or the ſaid Edward Nevil might have excuſed himſelfe to the King, or he might have waved it, and ſubmitted himſelf to his Fine; as one who is diſtrained to be a Knight, or one learned in the Law is called to be a Serjeant, the Writ cannot make him a Knight, or a Serjeant; And when one is called by Writ to Parliament, the Order is, that he be apparrelled in his Parliament Robes, and his Writ is openly Read in the Upper houſe, and he is brought into his place by two Lords of Parliament, and then he is adjudged in Law, Inter pares Regni, that is to ſay, Ut cum olim Senatores e cenſu eligebantur, ſic Barones apud nos habiti fuerint, qui per integram Baroniam terras ſuas tenebant, ſive 13. feoda militum, & tertiam partem unius Feodi militis, quolibet Feodo computato ad 20l. quæ faciunt 400. marcas denarii erat valentia unius Baroniæ integræ, & qui terras & redditus ad hanc valentiam habuerint, ad Parliamentum ſummoniri ſolebant; So that by this it appeares, that every one who hath an entire Barony may have of right and of courſe a Writ to be ſummoned to Parliament, for without Writ none can ſit in Parliament: And with this agrees our Books, for Una voce they agree, that none can ſit in Parliament as Peer of the Realm, without matter of Record, and if Iſſue be taken, whether a Baron or no Baron, Earl or no Earl, this ſhall not be tryed Per pais, but by the Record, by which it appeares, that he was a Peer of Parliament: for without matter of Record he cannot be a Peer of Parliament

liament, 35 H. 6. 46. 48 Ed. 3. 30. b. 48 Aſſ. pl. 6. 22 Aſſ. pl. 24. Regiſter, 287. Henricus tertius poſt magnas perturbationes & enormes exactiones inter ipſum Regem, Simonem de monte forti, & alios Barones motas & ſuſceptas ſtatuit & ordinavit, quod omnes illi Comites & Barones regni Angliæ, quibus ipſe Rex dignatus eſt brevia ſummonitiones dirigere, venirent ad Parliamentum, & non alii niſi forte Dominus Rex alia illa brevia eis dirigere voluiſſet: Which Act or Statute continues in force to this day, ſo that now none, although that he hath an entire Barony, can have a Writ of Summons to Parliament without the Kings Warrant, under the priby Seal at leaſt.

But if the King create any Baron by Letters Patents under the Great Seal to him and to his Heirs, or to him and to his Heirs of his body, or for life, &c. there he is a noble man preſently; for ſo he is expreſly created by Letters Patents of the King, which cannot be countermanded: And he ought to have a Writ of Summons to Parliament of right and of courſe, and he ſhall be tryed by his Peers, if he ſhall be arraigned before any Parliament, but ſo ſhall not he be who is called by Writ, untill he ſits in Parliament, which is the diverſity.

Richard the ſecond, created John Beauchamp of Holt, Baron of Kiderminſter, by Letters Patents, dated 10 Oct. 11. year of his Raign, where all others before him were created by Writ.

Trin. 8. Jac.

IN this very Term Thomas Oldfield came out of the Court of the Dutchy, and before he came into Weſtminſter Hall, with a Knife ſtabbed one Ferrar, a Juſtice of Peace, of which he dyed: And if Oldfield ſhould have his right hand cut off, was the queſtion before the two chief Juſtices, chief Baron, Walmſley, Warberton, Foſter, and divers other Juſtices. And it was reſolved, No; for it ought to be in the Hall of Weſtminſter, Sedentibus Curiis, as it appears in 3 Eliz. Dyer 188. 41 Ed. 3. title Coron. 280. And a Precedent was thereon, An. 9 Eliz. in Banco le Roy, where one Robert Gerling ſmote one in Whitehall, ſitting in the Court of Requeſts, and was but fined and ranſomed: The ſame Law if one ſmite one in the Court of the Dutchy, &c. But if one ſmite another before the Juſtices of Aſſiſe, there his Right-hand ſhall be cut off, as it appears, 22 Ed. 3. fol. 13, and 19 Ed. 3. title Judgment. And one Bellingham, An. 2 Jac. in the Hall of Weſtminſter, Sedentibus Curiis, with his Elbow and Shoulder out of malice juſtled Anthony Dyer of the inner Temple, ſo that he over-threw him, and with his feet ſpurned him upon the Legges, but did not ſmite him neither with his hand, nor with any Weapon: And yet it was held that his right hand ſhould be cut off, &c. upon which Bellingham was indicted in Banck le Roy, and after obtained his pardon.

A caſe was put to all the Juſtices of England, which was ſuch; The Biſhoprick of Waterford and Liſmore, being originally two Biſhopricks diſtinct, were by lawfull authority in the Raign of H. 3. united and conſolidated, but the Chapiters yet remain ſeverall: After which union the Biſhop alened Lands of the See of Waterford, and alened Lands of the See of Liſmore, with the confirmation of the chapiter of Liſmore; the Queſtion

ſtion was, whether ſuch Alienations are not voidable by the Succeſſor, being without the confirmations of both the Deans and Chapiters. The ſecond Queſtion was, whether the Queen might avoid ſuch Alienations Contra formam collationis, by Seiſure, or otherwiſe: And the Juſtices demanded a view of the Union; to which it was anſwered, That it was not extant; then it was reſolved by the Juſtices, that inaſmuch as the uſage hath been after the ſaid union, that the ſeverall Deans and Chapiters have ſeverally made confirmations, ut ſupra; it ſhall be intended that the Union was made eſpecially in ſuch manner, ſcil. That notwithſtanding the Union, yet for avoiding of confuſion, and in reſpect of the remoteneſſe of the Deaneries and Chapiters, that Eſtates made ſhall be ſeverally confirmed, as before the Union, and then ſuch confirmations ſhall be good, for in ſuch caſe, Modus & conventio vincunt Legem: but if the Union was made generally, and the Biſhop eligible by both Chapiters, then Eſtates made, ought to be confirmed by both the Chapiters, vide 50 Edward 3. title Aſſiſe Statham, the time of R. 2. title Grant, 27 H. 8. Dyer 58. 11 Eliz. Dyer. 33 H. 8. cap.

It was reſolved, that upon a lawfull Alienation made, with confirmation of the Dean and Chapiter, no Contra formam collationis lyeth upon the Statute of Weſtmin. 2. as hath been reſolved in the ſeventh part of my Reports.

Trin. 8. Jac.

Convocation.

NOte, it was reſolved by the two chief Juſtices and divers other Juſtices, at a Committee before the Lords in the ſame Parliament, divers points concerning the authority of a Convocation.

1. That a Convocation cannot aſſemble at their Convocation, without the aſſent of the King.

2. That after their aſſembly they cannot confer to conſtitute any Canons, without licenſe del Roy.

3. When they upon conference conclude any Canons, yet they cannot execute any of their Canons without Royal aſſent.

4. They cannot execute any after Royal aſſent, but with theſe four limitations:

1. That they be not againſt the Prerogative of the King.
2. Nor againſt the Common Law.
3. Nor againſt any Statute Law.
4. Nor againſt any Cuſtome of the Realm.

And all this appeares by the Statute 25 H. 8. cap. 19. and this was but an affirmance of what was before the ſaid Statute, for that it appears by the 19 Ed. 3. title. Quare non admiſit. 7. where it is held, that if a Canon Law be againſt the Law of the Land, the Biſhop ought to obey the Commandment of the King, according to the Law of the Land, 10 H. 7. 17. there is a Canon that no Spirituall perſon ſhall be put to anſwer before a ſecular Judge; But this does not bind, becauſe it is againſt the common Law: And it appears by the Statute of Merton cap. 9. that they in caſe of Baſtardy were enforced to certifie againſt the Law of holy Church, that Nati ante matrimonium fuerint Baſtardi, quia Eccleſia habet tales pro legitimis, & rogaverunt omnes Epiſcopi Magnates quod conſentirent, quod qui nati fuerint

ante

ante matrimonium essent legitimi, which proves, that the Cannon Law in this point being repugnant to the Law of the Land, was not of any force: And for this, they implored the aid of the Parliament, Et omnes Comites & Barones una voce responderunt, quod nolumus leges Angliæ mutare, quæ huc usque usitatæ sunt & approbatæ.

2 H. 6. 13. A Convocation may make Constitutions, by which those of the Spiritualty shall be bound for this, that they all, or by representation, or in person are present, but not the temporalty.

21 Ed. 4. 47. The Convocation is Spirituall, and all their Constitutions are Spirituall. vide the Records in the Tower of 18 H. 8. 8 Ed. 1. 25 Ed. 1. 11. d. 2. & 15 Ed. 2.

Prohibitio Regis ne Clerus in Congregatione sua, &c. attempter contra jus seu Coronam: nalia, Ne quod statuat in Concilio suo in præjudicium Regis seu legis, &c. By which it appears, that they can do nothing against the Law of the Land; for every part of the Law, be it Common Law, or Statute Law, cannot be abrogated nor altered without an Act of Parliament, to which every one shall be party, except the Spirituall Causes, or which concerns Spirituall persons, if it be against the Prerogative of the King and the Common Law.

Piracy, Trin. 8. Jac.

IN this very Term the King referred the consideration of Letters Patents of the Lord Admirall of England, to the two cheif Justices, and the chief Baron, whether by the said Leters Patents, the Goods which Pirates should take from others by robbery and Piracy did passe to the Lord Admiral, or no? And upon the consideration of the said Letters Patents it appeared to us, that he had Bona & Chattalla Piratorum, and also Bona & Chattalla deprædata, id est, the Goods robbed from others: which did not passe for two Causes.

1. If the King grant Bona & Chattalla felonum, the Patentee shall have the Goods and Chattels of the Felon himself, in which he hath property, but he shall not have the Goods and Chattels which the Felon stealeth from others.

2. The Goods taken from others the King cannot grant, for it appears by the Statute 27 Ed. 3. cap. 8. St. 2. that the Merchant, &c. so robbed shall be received to prove, that the Goods and Chattels belong to him by his Chart or Cocket, or by other lawfull proof of Merchants, &c. the said Goods shall be delivered without any Suit at the Common Law, which Act is generall, be the Robber privy or a stranger: But it was resolved, that untill such proof be made, the King may seise the said Goods; for Goods of which the property is unknown, the King may seise; And if they are Bona peritura, the King may sell them, and, upon proof, &c. restore the value. And note, the Statute doth not limit the Owner in case of depredation to any certain time to prove the property of the same Goods, as ought to be in case of Wreck, vide Stat. 31 H. 6. cap 4. vide 2 R. 2. cap. 2. 13 Ed. 4. 9. 10. a good resolution of the Justices. And the Register.

129. F.N.B. 114. when a Subject of the King, who is imployed beyond the Seas shall have a Writ, &c. for to take Goods within England, &c.

Simony, Trin. 8. Jac.

IT was agreed ad mensam, by all the Justices and Barons in Fleetstreet that if the Patron, for any money, present any person to any Benefice with cure &c. that then every such presentation and the admission, institution, and induction thereupon are void, although that the Presentee be not party nor privy to it: for the Statute intends to punish the wicked avarice of corrupt exactions by the losse of his Presentation hac vice, and the Statute gives the Presentation to the Queen: And all this Per verba statuti, which is penned strongly enough against corrupt Patrons.

Proclamations, Mich. 8. Iacobi.

Proclamation cannot make that an offence which was not.

MEmorand. That upon Thursday, 20. Sept. 8 Regis Jacobi, I was sent for to attend the Lord Chancellor, Lord Treasurer, Lord privy Seal, & the Chancellor of the Dutchy; there being present the Attorney, the Solicitor, and Recorder: And two questions were moved to me by the Lord Treasurer; the one, If the King by his Proclamation may prohibit new Buildings in and about London, &c. The other, If the King may prohibit the making of Starch of Wheat; And the Lord Treasurer said, that these were preferred to the King as grievances, and against the Law, and Justice: And the King hath answered, that he will confer with his privy Councill, and his Judges, and then he will do right to them. To which I answered. That these questions were of great importance. 2. That they concerned the answer of the King to the body, viz. to the commons of the house of Parliament. 3. That I did not heare of these questions untill this morning, at nine of the Clock; for the grievances were preferred, and the answer made, when I was in my Circuit. And lastly, both the Proclamations, which now were shewed, were promulgated, An. 5. Jac. after my time of Attorney-ship: And for these reasons I did humbly desire them that I might have conference with my Brethren the Judges about the answer of the King, and then to make an advised answer according to law and reason. To which the Lord Chancellor said, that every President had first a commencement, and that he would advise the Iudges to maintaine the power and Prerogative of the King; and in cases in which there is no authority and President, to leave it to the King to order in it according to his wisdome, and for the good of his Subjects, or otherwise the King would be no more then the Duke of Venice; And that the King was so much restrained in his Prerogative, that it was to be feared the bonds would be broken: And the Lord privy Seal said, that the Physitian was not allwayes bound to a President, but to apply his Medecine according to the quality of the disease: And all concluded that it should be necessary at that time to confirm the Kings Prerogative with our Opinions, although that there were not any former President or Authority in Law; for every President ought to have a Commencement.

To

To which I answered, That true it is, that every President hath a Commencement; but when authority and President is wanting, there is need of great considerations, before that any thing of novelty shall be established, and to provide that this be not against the Law of the Land: for I said, that the King cannot change any part of the Common Law, nor create any Offence by his Proclamation, which was not an Offence before, without Parliament. But at this time I only desire to have a time of consideration and conference with my Brothers, for Deliberandum est diu, quod statuendum est semel; To which the Sollicitor said, that divers Sentences were given in the Star Chamber upon the Proclamation against building; and that I my self had given sentence in divers cases against the said Proclamation: to which I answered, that Presidents were to be seen, and considerations to be had of this upon conference with my Brethren, for that Melius est recurrere, quam male currere; And the Indictment concludes, Contra leges & statuta; but I never heard an Indictment to conclude, Contra Regiam Proclamationem. At last my motion was allowed, and the Lords appointed the two chief Justices, chief Baron, and Baron Altham to have consideration of it.

Note, the King by his Proclamation, or other waies, cannot change any part of the Common Law, or Statute of Law, or the Customs of the Realm, 11 H. 4. 37. Forteſcue in laudibus Angliæ legum, cap. 9. 18 Ed. 4. 35. 36. &c. 31 H. 8. cap. 8. hic infra: Also the King cannot create any Offence by his Prohibition or Proclamation, which was not an Offence before, for that was to change the Law, and to make an Offence which was not: for, Ubi non est lex, ibi non est transgressio; ergo that which cannot be punished without proclamation, cannot be punished with it, vide le Stat. 31 H. 8. cap. 8 which Act gives more power to the King then he had before, and yet there it is declared, that proclamations shall not alter the Law, Statutes, or Customs of the Realm, or impeach any in his Inheritance, Goods, body, life, &c. But if a man be indicted for a contempt against a Proclamation, he shall be fined and imprisoned, and so impeached in his body and goods, vide Forteſcue, cap. 9. 18. 34. 36. 37, &c.

But a thing which is punishable by the Law, by fine, and imprisonment, if the King prohibit it by his Proclamation, before that he will punish it, and so warn his Subjects of the peril of it, there if he permit it after, this as a Circumstance aggravates the Offence; But he by Proclamation cannot make a thing unlawfull, which was permitted by the Law before: And this was well proved by the ancient and continuall forms of Indictments, for all Indictments conclude, Contra legem & consuetudinem Angliæ, or Contra leges & statuta. &c. But never was seen any Indictment to conclude Contra Regiam proclamationem.

So in all cases the King out of his providence, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibite them before, which will aggravate the Offence if it be afterwards committed: And as it is a grand Prerogative of the King to make Proclamation (for no Subject can make it without authority from the King, or lawfull Custom) upon pain of fine and imprisonment, as it is held in the 22 H. 8. Procl. B. but we do finde divers Presidents of Proclamations which are utterly against Law and reason, and for that void; for, Quæ contra rationem Juris introducta sunt, non debent trahi in consequentiam.

An Act was made, by which Forraigners were licensed to Merchandize within London, H. 4. by Proclamation prohibited the execution of it: and that it should be in suspence Usque ad proximum Parliamentum, which was against Law, vide dors. clauſ. 8 H 4. Proclamat. in London: But 9 H. 4.

An

An Act of Parliament was made, That all the Iriſh people ſhould depart the Realm, and go into Ireland before the feaſt of the Nativity of the bleſſed Lady, upon pain of death, which was abſolutely in terrorem, and was utterly againſt the Law.

Hollinſhead 722. An. Dom: 1546. 37 H. 8. the Whore-houſes called the Stews, were ſuppreſſed by Proclamation, and ſound of Trumpet, &c.

In the ſame Term it was reſolved by the two chief Juſtices, chief Baron, and Baron Altham, upon conference betwixt the Lords of the priby Council and them, that the King by his Proclamation cannot create any Offence which was not an Offence before, for then he may alter the Law of the Land by his Proclamation in a high point; for if he may create an Offence where none is, upon that enſues fine and impriſonment: Alſo the Law of England is devided into three parts, Common Law, Statute Law, and Cuſtom; but the Kings Proclamation is none of them: Alſo Malum, aut eſt malum in ſe, aut prohibitum, that which is againſt Law is malum in ſe; malum prohibitum is ſuch an Offence as is prohibited by Act of Parliament, and not by Proclamation.

Alſo it was reſolved, that the King hath no Prerogative, but that which the Law of the Land allows him.

But the King for prevention of Offences, may by Proclamtion admonish his Subjects that they keep the Lawes, and do not offend them; upon puniſhment to be inflicted by the Law, &c.

Laſtly, if the offence be not puniſhable in the Star-Chamber, the Prohibition of it by Proclamation cannot make it puniſhable there: And after this reſolution, no Proclamation impoſing Fine and Impriſonment, was afterwards made, &c.

Mich. 8. Iac.

No Prohibition after the Writ *De excommunicatio capiendo.*

NOte, it was reſolved in the ſame Term, that if a man be excommunicated by the Ordinary, where he ought not to be, as after a generall pardon, &c. and the Defendant being negligent doth not ſue a Prohibition, but remains excommunicate by forty daies, and upon Certificate in Chancery, he is taken by the Kings Writ De excommunicatio capiendo, that no Prohibition lies in this caſe, for that he is taken by the Kings Writ, and no Preſident or Authority can be found where a Prohibition was granted after the party was taken by the Kings Writ; for Prohibition lies to prohibite Eccleſiaſticall proceedings, not any thing which is done by the Kings Writ by force of the Common Law; and if a Prohibition be granted, it will not be deliver the party: Then it was moved, what remedy hath the party who ſo wrongfully excommunicated? To which it was anſwered, that he hath three remedies, viz.

1. He may have a Writ out of Chancery to abſolve him; for as it is held in 14 H. 4. fol. 14. In all caſes where a man is excommunicated by the Biſhop againſt our Law he ſhall have a Writ out of the Chancery directed to the Biſhop, commanding him to abſoil him: And with this agrees 7 Ed. 4. 14.

2. When a man is excommunicated againſt the Law of this Realm, ſo that he cannot have a Writ de Cautione admittenda, for then he ought

Parere

Parere mandatis Eccleſiæ in forma Juris, id eſt, Eccleſiaſtici, where in truth it is, Excommunicatio contra jus & formam Juris, id eſt, communis juris: Bu. if he ſhew his cauſe to the Biſhop, and requeſt him to abſoil him, for this, that he was excommunicated after the Offence was pardoned, or for this, that the cauſe doth not appear to Eccleſiaſticall Cognizance, and he refuſe to abſoil him, ſo that he is now diſabled to ſue any Writ of the King, ſo long as he remaines excommunicated, he may have an Action ſur le caſe againſt the Ordinary, who hath done him this Wrong, to diſable him in this caſe; and with this agrees the Dr. & Stud. lib. 2. cap. 32. fol. 119.

3. If the party be excommunicated for none of the cauſes mentioned in the Act of 5 Eliz. cap. 23. then he may have this for plea in the Kings Bench by the ſame act, and avoid the penalties inflicted by the ſame act.

Note; it was reſolved by the Court, &c. that where one is cited before the Dean of the Arches in cauſe of defamation, for calling the Plaintiff Whore, out of the proper Dioceſſe, ſcil. the Dioceſſe of LONDON againſt the Statute of 23 H. 8. and the Plaintiff hath ſentence, and the Defendant is excommunicated, and ſo continues eighty dayes: And upon Certificate into the Chancery, a Writ of Excommunicato capiendo is granted, and after the Defendant is taken and impriſoned by force of it, that he ſhall not have a Prohibition upon the Statute 23 H. 8. for no Writ in the Regiſter extends to it, Et ſententia, ſi quam fulminaveritis, ſine dilatione revocetis, and after ſentence is appealed, and Prohibition lyes, as appeares by the Regiſter: But no Writ nor Preſident can be ſhewn in this caſe, but there is a Writ in the Regiſter called a Writ De cautione admittenda, when the Defendant is taken by the Kings Writ De Excommunicato capiendo, de parendo mandatis eccleſiæ, and to abſoil and deliver the Defendant: But note a diverſity, where it appeares to the Court, that the matter of the Libel is not within their Juriſdictions, as of Ley-fee, or of Ley-contract, &c. there lyes a Prohibition with clauſe to deliver the party, for there he cannot find caution De parendo mandatis Eccleſiæ, for this, that Mandata Eccleſiæ, are contra legem & extra juriſdictionem ſuam: But in the caſe at the Bar, although it appears by the Libel, that the Defendant was of one ſuch Pariſh in London, yet inaſmuch as the Statute 23. H. 8. hath many exceptions, ſcil. That the Ordinary requeſt the Arch-biſhop, &c. to examine the caſe, &c. ſo that the ſaid defamation being the matter of the Libel, is of Eccleſiaſtical Cognizance, and the Statute hath many exceptions, ſo that it doth not appear to us judicially without information, that the Citation is againſt the form of the Statute; and this information comes too late in this caſe after the Defendant hath perſiſted ſo long in his contumacy, and is taken by the Kings Writ and impriſoned.

Admiralty.

IT was reſolved Per totam Curiam, that if one be ſued in the Admiralty Court for a thing alledged to be done upon the high Sea, within the Juriſdiction of the Admiral, and the Defendant plead to it, and confeſs the thing to be done, and after ſentence is given the Court will be adviſed to grant a Prohibition, upon Surmiſe, that it was done Infra corpus Comitatus, againſt their own confeſſion, unleſs it can be made to appeare to the Court

The Court cannot grant Prohibition after ſentence.

by any matter in Writing, or other good matter, that this was done upon the Land, for otherwiſe every one will ſtay untill after ſentence: And then for vexation onely ſue out a Prohibition; for although the admittance of the party cannot give a Juriſdiction to the Court where it of right hath none, for that it will be an encroachment upon the common Law; yet when the Court ſhall be adviſed that this is meerly for vexation, and ſhall be intended for delay, if the Prohibition ſhall not be ſued forth, till after ſentence; unleſſe that he can ſhew good matter to the Court to aſcertain the Court that this is not for vexation, it ſhall not be granted. And admonition was given to them which ſue forth Prohibitions, that they ſhould not keep them by long time in their hands, and notwithſtanding proceed in the Eccleſiaſtical Court, &c. and when they perceive that they cannot prevaile, then to caſt in their Prohibitions; for if they abuſe that liberty to the damage and vexation of the party, we will take ſuch order as in caſe of a Writ of Priviledge, if the Defendant keep it until the Jurors are ready, &c. it ſhall not be allowed.

Hill. 8. Jac.

In this very Term in the caſe of Doctor Trevor, who was Chancellor of a Biſhop in Wales, it was reſolved, that the Office of a Chancellor and Regiſter, &c. in the Eccleſiaſticall Courts, are within the Statute 5 Edw. 6. cap. 16. the words of which Statute are, Any Office, &c. which ſhall in any wiſe touch or concern the Adminiſtration or Execution of Juſtice; and the words are ſtrongly penned againſt corruption of Officers, for they are, Which ſhall in any wiſe touch or concern the Adminiſtration, &c. And the Preamble; And for avoiding of corruption, which may hereafter happen to be in the Officers and Miniſters of thoſe Courts, Places, and Rooms, wherein there is requiſite to be had the true adminiſtration of Juſtice, in ſervices of truſt: And to the intent, that perſons worthy and meet to be advanced to the place where Juſtice is to be miniſtred, in any ſervice of truſt to be executed, ſhould be preferred to the ſame, and none other. Which Act being made for avoiding of corruption in Officers, &c. and for the advancement of perſons more worthy and ſufficient for to execute the ſaid Offices, by which Juſtice and right ſhall be alſo advanced, ſhall be expounded moſt beneficially to ſuppreſs corruption. And inaſmuch as the Law allowes Eccleſiaſticall Courts to proceed in caſe of Blaſphemy, Hereſie, Schiſm, Incontinence, &c. and the loyalty of Matrimonies, of Divorce, of the right of Tythes, Probat of Wills, granting of Adminiſtrations, &c. And that from theſe proceedings depend not onely the ſalvation of Souls, but alſo the Legitimation of Iſſues, &c. and that no debt or duty can be recovered by Executors, or Adminiſtrators, without the probat of Teſtaments, or Letters of Adminiſtration, and other things of great conſequence; It is moſt reaſon that ſuch Officers, which concerne the adminiſtration and execution of Juſtice in theſe poynts, which concern the Salvation of Souls, and the other matters aforeſaid, ſhall be within this Statute, then Officers which concern the adminiſtration or execution of Juſtice in Temporal matters; for this, that corruption of Officers in the ſaid Spiritual and Eccleſiaſtical cauſes is more dangerous, then the Officers in Temporal cauſes; for the Temporal Judge commits the party convict to the Goa-

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ler, but the Spiritual Judge commits the perſon excommunicate to the Divel. Alſo thoſe Officers do not onely touch and concerne the adminiſtration of Juſtice, &c. but alſo are Services of great truſt, for this, that the Principal end of their proceedings is, Pro ſalute animarum, &c. and there is no exception or proviſo in the Statute for them.

It was reſolved that ſuch Offices were within the Purview of the ſaid Statute.

Hill. 8. Jacobi Regis.

IT is to be underſtood, that the Juriſdiction of the Admiralty is more ancient then Mr. Lambert in his Juriſdiction of Courts doth affirme, for there is held an opinion in theſe words concerning the Admiralty; I thinke that the Decision of Marine cauſes was not put out of the Kings houſe, and committed over to the charge of the Admiral, untill the time of Ed. 3. whereunto I am led, partly by the conſideration of the time of his Raign, which was much occupied in affairs beyond the Seas, and by reaſon of his Wars with France, and of the intercourſe and trade of Merchandize, which then flouriſhed; and partly, for that I find no mention of the Admiralty before the Raign of R. 2. who going about by a Statute, made the thirteen yeere of Raigne, to reſtrain the authority of that Court which had exceeded her known limits, doth take order, that it ſhould meddle no more than it was wont to do in the time of his Grandfather Edw. 3. thereby reducing its authority, as I thinke, to the firſt Original (hoc ille): But without Queſtion the Juriſdiction of the Admiralty is more ancient then the Raign of the ſaid King Edw. 3. For where it is ſaid, that there is found no mention of it before the time of Edw. 3. I find a notable Booke in the time of Edw. 1. title Avowry 192. which proves the Juriſdiction of the Admiralty more ancient then Mr. Lambert ſuppoſeth: The Caſe was, One brought a Replevin of his Ship taken on the Coaſt of Scarborough, upon the Sea, and carried into the County of Norfolke, and there detained: the Plaint of taking in the Coaſt of Scarborough, which is no Town nor place certain by which the Paiis may be taken; for the Coaſt contains four Leagues. And alſo of a thing done at Sea, this Court cannot have Cognizances, for this Judgment is given to Marriners. Beresford who gave the Rule in the caſe: The King wills that the Peace be kept as well upon the Sea as upon the Land: And we find that you come by due Proceſſe, and we ſee nothing why you ought not to anſwer, upon which Book I obſerve five things. Admiralty.

1. That of things done upon the Sea, certain judgment is given to Marriners, id eſt, to Admirals, as ſhall appear, and that doth not belong to the Court of the King, for this, that no Paiis may be taken there: And for this, that of a thing in any Town or place, where the Paiis or Jury may come, there the Admiral hath not Juriſdiction.

2. This proves directly, that then the Admirall hath juriſdiction to adjudge things done upon the Sea, from whence no Paiis may come; And this did not begin then: But without Queſtion, ſo long as there hath been Trade and Traffick (which is the Life of every Iſland) there was Marine Juriſdiction to redreſſe Depredations, Piracies, Murthers, and other Offences

ces upon the Sea: And to determine all Contracts made there; and this doth appear by the ſaid Bereſford chief Juſtice (who ſpeaks in the Voice of all the Court) where he ſaies, that the King willeth that the Peace be as well kept upon the Sea as upon the Land; and it is not poſſible that Peace ſhould be kept without juriſdiction of Juſtice.

3. The third thing to be Obſerved is, that if part of the matter be done upon the Sea, and part in a County, that the Common Law ſhall have all the juriſdiction.

4. The Sea within the juriſdiction of the Admirall, is deſcribed to be out of every County, for if the Sea be within any County, then paſſe may come from thence, and the Admiral hath juriſdiction where the Common Law cannot give remedy.

5. If a thing be done upon the Sea, Hors del County, the party may plead it to the juriſdiction of the Court: And all theſe points are directly without any ſtrain collected out of the ſaid Book.

And it is to wit, that in ancient time the juriſdiction of the Admiral was called Maritina Angliæ, and ſometimes Marina Angliæ, and ſo the Vocabulum artis was made of an Adjective, as the office of Chamberlainſhip of Eng. was granted to the Earl of Oxford of ancient time, Per nomen Cameratiæ Angliæ, ſo that Maritina Angliæ, ſince Marina Angliæ, ſignifies the Admiralſhip, or Marineſhip of England: for Marinus, id eſt quod θαλασσιος, that is, of the Sea, and θαλασσιαρχος, is the Admirall or Generall of the fleet; and Almarath, by Corruption Admiral, ſignifies the Governor or Captain of the Navy; and ſo Archigubernus ſignifies the Admiral or chief Governor of the Captains of the Navy, chiefe Captain of Mariners, Admiral of the fleet, Admiral of the Ships, &c. ſunt ſynonima: And in ancient time, ſometimes one was Admiral of all England, and ſometimes the Office was divided: And for this Ex Rotulo Patentium de An. 6 H. 3. de Maritina Cuſtodienda, the Letters Patents are; Dominus Rex commiſit Galfrido de Lacy Maritinam Angliæ cuſtodiendam, quamdiu Dominus Rex placuerit, with commandment of that attendance, Ad fidem, commodum, & honorem Domini Regis. Teſte apud Lond. 29. Auguſti.

Ex Rotulo Parentium Anno. 9 H. 3 Rex omnibus de Coſtera maris Norf: & Suff: ſalutem. Sciatis quod conceſſimus Ricardo Agnillum Marinam Guardiam Norf: & Suf: cum omnibus pertinentiis, ſcil. Erewel, Oreford, Dunmervie, Gerem. & Lenn cuſtodiendam quamdiu nobis placuerit, & ideo vobis mandamus, quod ei in omnibus, quæ ad dictam Marinam pertinent, intendentes ſitis & reſpondentes. Teſte, &c. apud Weſt. 3. Octob. And Geffrey Lacy was called Admiral of England.

Charta 15 H. 3. 28. Junii, Petrus de Rivall habet ad totam vitam ſuam Cuſtodiam omnium Portuum & totius Coſteræ Marinæ Angliæ cum omnibus libertatibus & liberis conſuetudinibus prædict. Portuum & Coſteræ Maris pertinentibus, &c. 2. pars. Patent. 25 Ed. in 14 Clauſ. in Dorſo in. 18 William Leybourne Capitaneus Marinariorum.

At this time there were two Admirals; the one had the Government of all the Fleet from the mouth of Thames verſus Boream the other from the mouth of Thames verſus occidentem 1. Pars Patent. 25 Ed. 1. 25. Martii in 9. Johannes Boterort Cuſtos Regis portuum Maritinorum verſus partes boreales, 1. Pars Patentium. 19 Ed. 2. 8 Dec. Nicolaus Kirril conſtituitur Admirallus del Fleete, ſcil. omnium Navium ab ore aquæ Thamaſis verſus partes occidentales. 18. Aug. Et ibid. Tho. de Drayton Admirallus ab ore aquæ Thamaſis verſus partes Boreales.

And ſo in the time of R. 2 H. 4 H. 5 H. 6. during whoſe Raigns there was likewiſe unus, qui fuit Admirallus Angliæ.

8 Ed.

8 Ed. 2. Coron. 399. (where a man may see that which was done of one part, and the other of the water, &c. in that place the County may have Cognizance, & it may be tryed by a Jury: which proves also, that that which may be tryed by the Common Law, doth not belong to the Admirals Jurisdiction: And Stamfords Pleas of the Crown, lib 1 fol. 51. citing this Book, saies thus, Viz. So this proves that by the Common Law before the Statute, &c. the Admirall shall not have Jurisdiction, unlesse upon the high Sea, which proves that the Admirall by the Common Law hath Jurisdiction upon the high Sea, Ex quo sequitur, that, his Jurisdiction was by the Common Law, and then it is so ancient, that the Commencement cannot be known; so that I do conclude, that his authority did not begin in the Raign of Ed. 3. as Mounsieur Lambert, upon uncertain conjectures supposeth: For if the Jurisdiction had then began and been instituted, it would have appeared upon Record.

Pasch. 9 Jac. Regis.

IT was resolved by the two chief Justices, the chief Baron, the Attorney and Sollicitor, that the King may erect any name of Dignity, which was ont before, and for that reason the King may create a Dignity, by name of Baronet, and create one to be a Baronet, to him and his Heirs Males of his body issuing.

It was resolved, that if he do not create him of some place, he shall not have an Estate tail, but Fee simple conditionall, which shall be forfeited for Felony: but if he create him Baronet of a place, then he shall have an Estate-tail, within the Statute of VVest. 2. and the King may grant to him and the Heirs Males of his body, precedency before Knights Baronets, Knights of the Bath, and Knights Bachelors, and also may grant precedency to their Wives, Sons, and Daughters, &c. And that he cannot create any Dignity above the Dignity of a Baronet, and under the Dignity of a Baron: And that the creation of this Dignity of a Baronet, shall not discharge the Heir to be in Guard, as if the Heir be made a Knight, for he is not made Knight by this, for the Dignity of a Knight is not descendable.

Pasch. 9 Jac. Regis.

NOte, that in trespasse and Treason, the highest and the lowest offence, there are not any accessaries, but all are Principall: But in case of Felony, above the summe of 12 d there and in case of death, &c. there may accessories, as well before as after; In case of petit Larceny there cannot be any accessory for the smalnesse of the felony; Then the Case is, That A. counterfeits the great Seal of England, and B. knowing that he did counterfeit it, receives him, and abets and conforts him: If B. in this case was guilty of the Treason, is the question. And it seems he is not, for although that A by the counterfeiting be a Traytor, the accepting and comforting of him cannot make him an accessory, for that in case of high Treason there can be no accessory, and a principal he cannot be, for this,

that at the time of the counterfeiting he did not know of it; but if one before the Act done, procure one to counterfeit the great Seal, there it is high Treason; for in the Law he counterfeits the great Seal: And in the Indictment he may be charged with the Fact, viz. the counterfeiting, but so is not he who receives after the Fact, for he cannot be charged with the Fact: And in case of Trespasse, he who gives consent and aid to the Trespasse, is a Principall in the Trespasse; And this, as to me it appears, is very apparent in reason, and agrees with our Books, as 19 H. 6. 47. b. he who is consenting and aiding to the making of false money, commits high Treason, for he is Particeps Criminis before the Fact done: but it is held in Conyers case, Mich. 13, & 14 Eliz. Dyer 296. that in the same case, if one after the act done, know of the making of false money, and receive the party, this is not Treason, but misprision of Treason, for not making discovery; and with this accords 3 H. 7. 10. that it is not Treason, which diversity Stamfords Pleas of the Crown, fol. 3. hath not well observed, vide Dyer 298. vide le Stat. 27 Eliz. which made him who received a Jesuite a Felon, for by the judgment of the Parliament the receit of a Jesuite, although he be a Traitor, is not Treason; for the Statute makes the returning of a Jesuite Treason, of which he who receives him cannot be indicted; but it is misprision for any who receives him and doth not discover, according to the resolution in Coyners case.

Pasch. 9 Jac. Regis.

Sir William Chanceys *Case.*

IN this very Terme Sir William Chancey having the priviledge of this Court, and being Prisoner in the Fleet, was brought to the Bar by Habeas Corpus by the Guardian de Fleete, who returned, that the said Sir William was committed to the Fleet by force of a Warrant from the high Commissioners in Ecclesiasticall Causes: the Tenor of which Warrant followes in these words:

THese are to will and require you in his Majesties Name, by vertue of his high Commission for Causes Ecclesiasticall, under the great Seal of England, to us & others directed, by force of a statute in such case provided, that herewithall you take and receive into your Custody the body of Sir William Chancey Knight, whom we will that you keep and detain under Custody, untill further order shall be taken for his enlargement, letting you know, that the cause of his Commitment is, for that being at the Suit of his Lady conveyed before his Highnesse Commissioners Ecclesiasticall, for Adultery, and for expelling her from his company, and Co-habitation with another woman, without allowing her any competent maintenance, and by his own confession convicted thereof; he was thereupon by order of Court enjoyned to allow his Wife a competent maintenance, according to his ability, and to perform such Submission and other order for his Adultery, as by Law should be enjoyned him. Which expresly he refu-

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sed to do, in contempt of his Majesties said Authority, to us on that behalf committed: Given at London 19 Martij 1611. subscribed,

London.

Hen. Mountague, *Thomas Morton,*
George Overall *Zachary Pasfield.*

And it was moved by Nicolas Serjeant of Councell with Sir VVilliam, that this return was insufficient, for two causes. The one for this, that Adultery ought to be punished by the Ordinary, and is not such enormous Offence that it shall be punished by the high Commissioners, upon which the Offender cannot have his appeal, or other remedy; And cleerly the Wife shall not sue there for Alimony, Quod fuit concessum per Coke, VVarberton, and Foster, but Walmsley doubted of Adultery; for it seemed to him, that this was an Offence enormious, 2. That by force of the Act 1 Eliz. the high Commissioners cannot imprison the said Sir William for Adultery, nor for denying Alimony to his Wife (if that was within their Jurisdiction). And although that the words of the Letters Patents gives them power to imprison the party, yet if the act doth not warrant it, they cannot imprison him. And Doderigde, Serjeant to the King, of Councell on the other side, did not defend the imprisonment to be lawfull; And it was cleerly agreed by Coke, Walmsley, Warberton & Foster, that the Commissioners had not power to imprison him in this case: And Walmsley said, that although they have used by twenty years, to imprison in such case, without exception taken, yet when it came before them judicially, they ought to judge according to Law: And upon this Sir William Chancey was bailed: Also it was resolved Per totam Curiam, that when upon the returne it doth appear, that the imprisonment is not lawfull, the Court may discharge him of imprisonment, but in this case, the Court thought fit rather to bail him, untill the next Term, and in the mean time to attend upon the Arch-bishop, and to do that which of right and reason they ought to do. Also it was resolved that the return was insufficient in form.

1. It is not shewen when the Adultery was committed.

2. He was enjoyned to allow his wife a competent maintenance, without any certainty; And to perform such submission and other order for his Adultery, as by the Law he shall be enjoyned, and it is all infuturo and uncertain what order they will take, and yet for the refusall they imprison him: Also they make their Warrant by force of a Commission to them and others directed, and do not say, or to any four of them, so that it may appear to the Court that they who made the Warrant had power by the Commission; also it is said in the Warrant, that he was summoned by the order of the Court, Vide in my Treatise at large, the reasons and causes for why the Commissioners (unlesse that it be in speciall cases) may sue and imprison, Vide Pasch. 42 Eliz, Rot. 1209. Ed. Thicknesse is imprisoned by the high Commissioners, and upon Habeas Corpus delivered by the Justices of the Common Pleas.

Pasch.

Paſch. 9 Jacobi Regis.

Empringhams Caſe, Star-chamber.

IN this very Term a caſe was moved in the Star-Chamber, upon a Bill exhibited by the Attorney general againſt Robert Empringham, Vice Admirall in the County of York, Marmaduke Kettlewell, one of the Marſhals of Admiralty, and Thomas Harriſon, one of the Informers of the Court of Admiralty in the ſaid County, and they were charged with oppreſſion and extortion, that they had fined and impriſoned divers of the Kings Subjects in the County of York, which no Judge of the Admiralty can juſtifie, for that the Court is not a Court of Record, but the proceedings there are according to the Civill Law, and upon their ſentence, Appeal and no Writ of Error lyeth: Alſo the ſaid Empringham hath cauſed divers to be cited to appear before him for things done in the body of the County; as for not repairing of the bancks of a River, which is within the body of a County: Alſo for cutting of Trees upon his own ſoyl, and ſuch like, which were determinable by the Common Law, and not before the Admirall, for his authority is limitted to the high Sea, and is out of any County: And for theſe and other Oppreſſions and Extortions they were by ſentence of the Court of Star-Chamber, fined, impriſoned, and an award, that Reſtitution ſhould be made &c.

Trin. 9 Jacobi Regis.

MEmorandum, that upon Thurſday before the Term of holy Trinity, all the Juſtices of England were by the command of the King aſſembled in the Councell-Chamber at VVhirehall, where was alſo Abbot, Archbiſhop of Canterbury, and with him two Biſhops and divers Civilians, where the Arch-biſhop did complain of Prohibitions to the high Commiſſioners out of the Common Pleas, and the delivery of perſons committed by them by Habeas Corpus, and principally of Sir VVilliam Chancey, where I defended our proceedings, according to the Treatiſe which I made of it, and which I delivered before the high Commiſſioners: And after great diſputation betwixt the Arch-biſhop and me, at laſt the Arch-biſhop ſaid, that he had a point not yet touched upon in my Treatiſe, which would give ſatisfaction to the Lords, and to us alſo without queſtion, upon which he would relye; and that was the clauſe of reſtitution and annexation, ſcil. And that all ſuch Juriſdictions, Priviledges, Superiorities, and Preheminencies Spirituall and Eccleſiaſticall, as by any Spirituall power or authority hath heretofore, or hereafter lawfully may be exerciſed or uſed, for the viſitation of the Eccleſiaſticall State and perſons, and for reformation, order, and correction of the ſame, and of all Errors, Hereſies, Schiſms, &c. ſhall for ever by authority of this preſent Parliament, be united and annexed to the imperiall Crown of this Realm: And it was ſaid, that the Kings H. 8. and Ed. 6 gave power by their Commiſſions under the great Seal to divers to impoſe Mulcts, &c. in Spirituall and Eccleſiaſticall cauſes, &c. and upon this he concludes, that inaſmuch as this had been uſed before 1 Eliz. this is given to the Queen Eliz. and her Succeſſors: Alſo inaſmuch as by the Statute of 2 H. 4. and 2 H. 7. the Juriſ-

diction

diction Eccleſiaſtical may fine and impriſon in certain particular cauſes Eccleſiaſtical, for this cauſe Juriſdiction to fine and impriſon in all Eccleſiaſtical cauſes is given to the King : And this he ſaid he uttered to the intent that it may be anſwered ; To which I for a time gave this anſwer, That it was good for the Weal-publick, that the Judges of the common Law ſhould interpret the Statutes, and Acts of Parliament within this Realm ; and that if ſuch interpretation ought to be made, was abſurd and againſt Law and reaſon for divers cauſes.

1. For that if ſuch word (lawfully) were omitted, that yet this Act, as appears by the Title and Preamble, being an act of Reſtitution, ought to be intended of lawfull juriſdictions, priviledges, &c.

2. Theſe words, Heretofore hath, or hereafter lawfully may be exerciſed, &c. This word lawfully extends as well to times paſt, as to times future : And all this was affirmed by all the Juſtices.

2. It was ſaid by me, that before the Statute of 1 Eliz. no Eccleſiaſtic all Judge may impoſe a Fine or Impriſon for any Eccleſiaſticall or Spirituall Offence, unleſſe there be authority by act of Parliament : And this was ſo affirmed by all the Juſtices, that although in ſome caſes they may fine and impriſon, that by this clauſe in all caſes they may fine and impriſon, was ſo manifeſt, that it was not worthy any anſwer : But now I have ſeen the Commiſſion made to Cromwell to be Vice-gerent, and other Commiſſions to others by his appointment, for this, that he was imployed in the affairs of the Kingdome, in which Commiſſion are theſe words, Vide my Book of Preſidents, the Commiſſion at large.

And afterwards in this very Term the priby Council ſent for the Juſtices of the common Pleas onely, and there the reaſons and cauſes of the ſaid reſolution were largely debated, and oppoſition was made as much as might be by Egerton Lord Chancellor, but the Juſtices of common Pleas remained conſtant in their former Opinion ; and afterwards the Councill ſent for the chief Juſtice of the Kings Bench, Juſtice Williams, Juſtice Crook, Tanfield chief Baron, Snig, Altham, and Bromley, who were not acquainted with the reaſons and cauſes of the ſaid Rule of the common Pleas ; nor did they know for what cauſe they came before the Councill, and hearing the Lord Chancellor affirme, that the high Commiſſioners have alwayes by Act of 1 Eliz. impoſed Fines and Impriſonment for exorbitant Crimes (without any conference with us) were of a ſuddain Opinion with us, without any conference amongſt themſelves, and without hearing of the matter debated : And after at another day this very Term, the ſaid Judges of the Kings Bench, Barons of the Exchequer, and Juſtice Fenner and Yelverton, who were omitted before, and We the Juſtices of the Common Pleas were commanded to attend the priby Council ; And when we all were aſſembled, We of the common Pleas were commanded to retire, for that, as the Lord Treaſurer ſaid, we had conteſted with the King, and in our abſence the King and the Prince ſate with the Council, and then the Juſtices of the Kings Bench and Barons of the Exchequer, were ſeriatim with the Councill : And the King demanded their Opinions in certain poynts concerning the high Commiſſion, with which they were not acquainted before, which were not related to us. In all which as appears, after they were not unanimouſly agreed and after two houres and a halfe, We the Juſtices of the Bench, Coke, Valmſley, Warberton, and Foſter, were commanded to come before the King, the Prince, and the Council, where the King declared, that by the advice of his Councill, and by the advice of the Juſtices of the Kings Bench, and Barons, he will reforme the high Commiſſion in divers poynts

and reduce it to certain Spirituall Causes, the which after he will have to be obeyed in all points : And the Lord Treasurer said, that the principal Feather was plucht from the high Commissioners, and nothing but Stumps remaining ; and that they should not intermeddle with matters of importance, but of petit Crimes ; and this word (Errors) being general, shall be explained, and no Obligations shall be taken of the parties, as before absurdly and unjustly (as he said) had been taken, and divers other things were reformed, as he said, but he did not declare them in particular.

To which it was said by me to the King, that it was grievous to us his Justices of the Bench, to be so severed from our Brethren, the Justices and Barons, but more grievous that they differed from us in Opinion, without hearing one another ; and especially forasmuch as we have proceeded in the case of Sir VVilliam Chancey, and other cases concerning the power of the high Commissioners in imposing of Fines and Imprisonment judicially in open Court, upon argument at the Bar and the Bench, where it was resolved by us, that the high Commissioners cannot fine and imprison, but in certain cases ; and the judicial course ought to be judicially reversed : But I said to the King, that when we the Justices of Common Pleas see the Commission newly reformed, we will, as to that which is of right, seek to satisfie the Kings expectation ; and so we departed without any demand of our Opinions.

Trin. 9. Iac. Regis.

Stockdales Case in the Court of Wards.

THe King by his Letters Patents, dated 9. April, the ninth year of his Raign, granted, assigned and set over to VVilliam Stockdale, in these words;

Such and so many of the Debts, Duties, Arrerages, and Summs of Money, being of Record in our Court of Exchequer, Court of Wards and Liveries, Court of the Dutchy of Lancaster, or within any other Court or Courts within this our Realm of England, or being of Record in any of our said Courts, &c. in any year, or severall years from the last yeer of the Raign of H. 8. untill the thirteenth yeer of our late Dear Sister, as shall amount to the Summe of a thousand pound, to have, take, levy, recover, and enjoy the said Debts, Duties, Arrerages, and Summs of Money amounting unto the Summe of a thousand pound, before in and by these presents given and granted to the said William Stockdale, his Executors, Administrators, and Assignes.

And in this case divers points were resolved.

1. That the said grant of the King is void for the incertainty, for by the Grant no debt in certain may pass, and if it cannot pass by the Grant at the beginning, it shall never pass, as this case is : As if the King hath a hundred acres of Land in D. and he grants to a man twenty acres of the Land in D. without any describing of them by the Rent, or Occupation, or name, &c. this Grant is void, and in the case of the King, the Patentee shall not have his election, as he shall in the case of a common person ; but in case of the King, if the twenty acres are described, or by abuttals, or by

by name certain in the particular, this is good demonstration which twenty acres shall passe.

2. Where the Patentee claimes by force of this word Arrearagia, to have arrearages of Rents, Reliefs, and mean Rates of Lands, &c. in the Court of Wards, &c.

It was resolved cleerly, that he shall not have them, if the Patent had not gone further; for inasmuch as this word Arrerages is coupled with these words, Debts, Duties, and with these words subsequent (Summs of Money) it shall be intended of arrerages of things personal, and not of things real; as of arrerages of accompt of Moneys delivered in Prest, &c.

But the Proviso in the end of the Patent, scil. Provided allwayes, that the said VVilliam Stockdale shall take no benefit by any means of arrerages of any Rents, Reliefs, Tenths, or annual Payments whatsoever, untill Sir Patrick Murrey and others be satisfied and paid the Summe of 10000 l. &c. hath well explained what arrerages the King intended, viz. of Rents, &c. and so to construe one part of the Patent by the other; But cleerly mean Rates are not within the said words, for they are the profits of demeasn Land.

Trin. 9. Jac. Regis.

DIvers men playing at Bowles at great Marlow in the County of Kent, two of them fell out, and Quarrelled the one with the other, and a third man who had not any Quarrel, in revenge of his friend, struck the other with a Bowl, of which Blow he Dyed; This was held Man-slaughter, for this, that it hapned upon a suddain motion in revenge of his friend. Man-slaughter.

In the very same Terme a speciall Verdict, being divers yeares past found in the County of Hereford, the effect of which; That two Boyes combating together, the one of them was scratched in the Face, and his Nose voided a great quantity of Blood, and he so runne three quarters of a mile to his Father, who seeing his Son so abused, and the Blood run from him, and his Cloaths and Face all Bloudy, he took in his hand a Cudgell, and went three quarters of a mile to the place where the other Boy was, and struck him upon the head, upon which he dyed. And this was held but Man-slaughter, for the ire and passion of the Father was continued, and there was no time that the Law can determine that it was so setled, that it shall be adjudged in Law, Malice prepense; and this case was moved ad mensam, &c.

Mich.

Mich. 9. Iac. Regis.

High Commiſſion.

MEmorandum, that upon Thurſday in this Term, a high Commiſſion in Cauſes Eccleſiaſtical was publiſhed in the great Chamber of the Archbiſhop at Lambeth, in which I with the chief Juſtice, chief Baron, Juſtice Williams, Juſtice Crook, Baron Altham, and Baron Bromley, were named Commiſſioners, amongſt all the Lords of the Council, divers Biſhops, Attorney, and Sollicitor, and divers Deans and Doctors of the Canon and civil Lawes; and I was commanded to ſit by force of the ſaid Commiſſion, which I refuſed for theſe cauſes.

1. For this, that I, nor any of my Brethren of the common Pleas were acquainted with the commiſſion, but the Judges of the Kings Bench were.

2. That I did not know what was contained in the new Commiſſion, and no Judge can execute any commiſſion with a good conſcience without knowledge; and that alwayes the gravity of the Judges hath been to know their commiſſion, for Tantum ſibi eſt permiſſum, quantum commiſſum: And if the commiſſion be againſt Law, they ought not to ſit by vertue of it.

3. That there was not any neceſſity that I ſhould ſit, who underſtand nothing of it, ſo long as the other Judges were there, the advice of whom had been had in this new Commiſſion.

4. That I have endeavoured to informe my ſelf of it, and have ſent to the Rolls to have a copy of it, but it was not enrolled.

5. None can ſit by force of any commiſſion, untill he have toke the Oath of Supremacy, according to the Statute of 1 Eliz. And for this, if they will read the commiſſion ſo that we may hear it, and have a copy to adviſe upon it, then I will either ſit or ſhew cauſe to the contrary. But the Lord Treaſurer would for divers reaſons perſwade me to ſit, which I utterly denyed.

And to this the chief Juſtice, chief Baron, and ſome others of the Judges ſeemed to incline, upon which the Lord Treaſurer conferred in private with the Arch-biſhop Bancroft, who ſaid to him, that he had appointed divers cauſes of Hereſie, Inceſt, and enormous Crimes to be heard upon this day, and for that he would proceed; but at laſt he was content that the Commiſſion ſhould be ſolemnly read, and ſo it was, which contained three great Skins of Parchment, and contained divers poynts againſt the Laws and Statutes of England: And when this was read, all the Judges rejoyced that they did not ſit by force of it: And then the Lords of the Council, Viz. The Arch-biſhop, the Lord Treaſurer, the Lord privy Seal, the Lord Admiral, the Lord Chamberlain, the Earl of Shrewsbury, the Earl of Worceſter, with the Biſhops, took the oath of Supremacy and Alleageance, and then we as Commiſſioners were required to take the Oath, which I refuſed untill I had conſidered of it: But as the Subject of the King, I and the other Judges alſo took the Oath of Supremacy and Alleageance.

Then the Lord Arch-biſhop made an Oration in commendation of the care and providence of the King for the peace and quiet of the Church; Alſo he commended the Commiſſioners, alſo the neceſſity of the Commiſſion to proceed ſummarily in theſe dayes, wherein ſins of deteſtable nature, and Factions, and Schiſms did abound, and proteſted to proceed ſincerely by

force

force of it, and then he cauſed to be called a moſt blaſphemous Heretick, and after him another, who was brought thither by his appointment, to ſhew to the Lords and the Auditory the neceſſity of that Commiſſion.

And after, the Arch-biſhop came to the chief Juſtice and to me, and promiſed us, that we ſhould have a Copy of the Commiſſion, and then I ſhould obſerve the diverſity between the old Commiſſion and this; and all the time that the long Commiſſion was in reading, the Oath in taking, and the Oration made, I ſtood and would not ſit, as I was requeſted by the Arch-biſhop and the Lords, and ſo by my example did all the reſt of the Juſtices.

And the Arch-biſhop ſaid, that the King had commanded him to ſit by vertue of this new Commiſſion, in ſome open place, and at certain daies: And for that cauſe he had appointed the great Chamber at Lambeth in Winter, and the Hall in the Sommer; and every Thurſday in the Term time, at two of the Clock in the after-noon, and in the fore noon, he would have a Sermon for the better informing of the Commiſſioners of their duty, in the true and ſincere execution of their duties.

Mich. 9 Jacobi Regis.

IN this ſame Term the Iſſue in an Information upon the Statute 2 H. 6. 15. was tryed at the Bar, and upon the evidence upon the words of the ſaid Act, which are that every perſon which ſetteth or faſtneth in the River of Thames, any Nets or Engines called Trincks, or any manner of Nets, to any Poſts, Boats, Anchors, or the like thing, to ſtand continually day and night, forfeiteth to the King a hundred ſhillings, for every time, &c. and the Defendants having ſet and faſtned Nets called Trincks, in the River of Thames, &c. to Boats day and night, for ſo long time as the Tyde did ſerve, and not continually;

The queſtion was, if this was within the Statute. And it was cleerly reſolved, that it was within the Statute; for the Nets called Trincks, cannot ſtand, but for ſo long as the Tyde ſerves: And for this, the word Continually ſhall be taken continually ſo long as they may ſtand to take Fiſh, and as the time of fiſhing endures, be it in the day or night, for Lex non intendit aliquid impoſſibile, for otherwiſe the Law ſhould not be of any effect: And although that it was ſaid, that this Statute remains in force, and if any had complained of any offence againſt it, he ſhall be puniſhed, but the reaſon for why no execution hath been made of this Act, was for this, that none ſhall have benefit by the Suit but the King only, for the penalty is only given to the King. And as it doth appear by the Preamble, and in the Proviſo in the Act, the manner of the Nets was not the cauſe of the making of the Act, for by the Proviſo every man may fiſh in his ſeaſonable time with Trincks, if they are of Aſſiſe, drawing and conveying them with their hands, as other Fiſhers do, and not faſtning them to Poſts, Boats, or Anchors, &c. continually to ſtand; for the miſchief was, by faſtning them, and the ſtanding of them continually, the brood and fry of Fiſh were deſtroyed, and diſturbance made to common paſſage of Veſſels, as Weers, Lidels, and other Engines.

Mich. 9 Jac. Regis.

Shulter's Caſe in the Star-Chamber.

IN Camera Stell. the Caſe was ſuch; John Shulter of Wisbich of the age of 115. years had Iſſue John his eldeſt Son, and others, viz. Chriſtopher, Richard, &c. and being ſeiſed of Lands in Fee of the value of a hundred marks, per annum, his eldeſt Son being dead, and his Grand-child John being within age he intended, and ſo gave direction to make a leaſe of a Farm called Rouſhall to Chriſtopher during the minority of his Grand-child, rendring the antient Rent, with power of Revocation: and of Lands in Patsbury to the ſaid Richard, in the ſame manner, and for the ſame time: and Chriſtopher and Richard by the Covin and aide of one Woodrof a Scrivener, 24 Eliz. drew and ingroſſed two ſeverall Leaſes of the Premiſſes ſeverally to Chriſtopher and Richard, for one and fifty years, rendring but four pence per annum, and without any power of Revocation: And John Shulter the Grand-father could read and write very well, but by reaſon of his great age was blind; and Woodrof declared to him, that the effect of the ſaid Leaſes were in all points according to his direction: And upon this the ſaid John Shulter, the Grand-father, ſealed and delivered as his Deeds.

And it was reſolved by the Lord Elleſmere Chancellor, and the two chief Juſtices, that the ſaid Indentures could not bind the ſaid John Shulter, for this, that he was blind, and like to one who could not read at all; and that the effect being declared unto him in other manner then in truth the Indentures were; It did fully agree with Manſers Caſe in the ſecond part of my Reports, fol. 4.

Mic. 9 Jac. Regis.

Sir Anthony Aſhley's Caſe.

Conſpiracy. BEtween Sir Anthony Aſhly Knight, Plaintiff, and Sir James Creighton, Knight, Hercules Hunnings, John Cantrell Servant of Hunnings, Thomas Hampton, Archibald Sterling, Servants to Sir James Creighton, Henry Smith, Mary Rice, and divers others Defendants, the Caſe was thus:

Sir James Creighton had bought a pretended right of and in the Manor of Lyddy and Villiſent, and divers other Lands of which Sir Anthony had long poſſeſſion; upon which divers motions were made concerning Fines acknowledged to be ſtaid, &c. in the Common Bench, and Sir James Creighton not prevailing in it, and Sir Anthony (for divers miſdemeanors only, heard before the Lords of the Council, at the Council Table, being dicharged to be one of the Clerks of the Councill and in great diſgrace he entered into a wicked and damnable Conſpiracy with the other

ther Defendants, to accuſe the ſaid Sir Anthony of ſome hainous and capitall Crime, by which he ſhould forfeit all his Land to the value of two thouſand marks per annum, and his Goods and Chattels to a great value, which they ſhould ſhare amongſt them: And in the end, Henry Smith, who had been the Servant of Sir Anthony, was ſuborned by the ſaid Sir James, and others, to accuſe the ſaid Sir Anthony, of the Murther of one William Rice, who was the Husband of the ſaid Mary Rice, one of the Defendants, which William Rice was dead above eighteen years before, upon ſurmiſe made by Sir James Creighton, that after the Attainder of Sir Anthony Aſhley, Smith ſhould have a Portion of five hundred pounds in money; and that Sir James ſhould procure of his Uncle, the Captain of the Guard, a place of the Guard in Ordinary, and procure the King to grant protection to the ſaid Smith againſt his Creditors, and a generall pardon of all Offences, but he would not make any accuſation of the ſaid Sir Anthony untill he had aſſurance of it; And upon this, Articles by writing Indented, were drawn and ingroſſed by one Thomas Wood, a Scrivener, who dwelt in an obſcure place about the Tower, made between Sir James Creighton of the one part; and the ſaid John Cantrell, Servant to Hunnings, by the conſent of Smith, and to his uſe, on the other part, by which Sir James covenanted, that the ſaid John Cantrell and his Heirs after the conviction and attainder of Sir Anthony Aſhley, ſhall have the ſixth part of his Mannors, Lands, Tenements, and Hereditaments, Goods and Chattels in ſix parts to be divided, in conſideration that Cantrell covenanted, &c. that he ſhould procure witneſſes to convict the Plaintiff of Murther, or other Captiall Crime, and to deliver to Sir James Creighton a true particular of all the Lands Goods and Chattels of Sir Anthony, which Articles were ſealed and delivered by Sir James Creighton, 16. Feb. Ann 7. Jac. And at the ſame time he was bound to Cantrell in an Obligation of eight thouſand pound for performance of the ſaid Articles, and after, within two daies after the ſaid Articles were ſealed and deliveted, Henry Smith counterfeited himſelf to be ſick, and then he revealed the ſaid Murther in diſcharge, as he pretended, of his conſcience, and accuſed himſelf of poyſoning of the ſaid William Rice, by the commandment of the ſaid Sir Anthony Aſhley, ſo that he himſelf was the Principall; And upon this Sir James Creighton procured the ſaid Mary Rice, late the VVife of the ſaid William Rice, to prefer a Petition to the King, importing the accuſation aforeſaid: the King referred the Petition to the chief Juſtice of the Kings Bench, to examine the cauſe and the VVitneſſes on both ſides, the which he did, and certified the King that he had found a falſe Conſpiracy, to indict Sir Anthony without any juſt ground; and certified alſo the effect of the ſaid Articles, upon which the King after conference with his privy Councill, and by their advice thought the matter neceſſary to be heard and ſentenced in the Star-Chamber, the which matter upon ordinary proceedings was heard by ſix daies in the very ſame Term: And it was objected by the Councel of the Defendants, that the Bill upon the ſaid Conſpiracy did not lye, and that it ſhould be dangerous to maintain it; for if it ſhould be lawfull for every one who is accuſed, or was in fear, to be accuſed of any capitall Crime, to exhibite his Bill in this Court againſt the Accuſer and all the witneſſes, and by many captious and intricate Interrogatories ſeverally to examine them, to find contrariety in them in circumſtances; This will deter men to proſecute againſt great Offenders, and thence great Offences will paſſe unpuniſhed, which will be dangerous to the weall publick, and by the Law Conſpiracy lies when a man is indicted, and *Legitimo modo acquietus*; but here he was never indicted, and

for

for that it may be, that Sir Anthony is guilty of the ſaid Crime, and then are all mouthes ſtopped to ſay the contrary.

But to that it was anſwered and reſolved by the Lord Chancellor, the two chief Juſtices, and all the Court, that in this caſe the Bill was maintainable, although that the party accuſed was not indicted and acquitted before, as it was reſolved in this Court, Hil. 8. Jac. in Poulters caſe, and for the reaſons and cautions there expreſſed; Alſo in this caſe at the Bar, be Sir Anthony guilty or not guilty of the ſaid Murther, yet the Defendants are puniſhable for the great & hainous miſdemeanor and conſpiracy, &c. for promiſing of the ſaid Bribes and Rewards to ſuborn the ſaid Henry Smith to accuſe the Plaintiff of the ſaid Murther eighteen yeers paſſed, & the Articles in writing to ſhare and divide the Eſtate of Sir Anthony after the Attainder; for this corrupt Conſpiracy, and great and perilous practiſe and miſdemeanor; the Defendants ſhall be puniſhed, let Sir Anthony be guilty or not of the ſaid Crime. And it is a great indignity offered to the King for any Subject, to preſume to covenant or aſſume, that the King ſhall grant protection or pardon, or that the Eſtate of any man ſhall be ſhared and divided before his Attainder.

So that although that the Court will not enter into the examination of the Crime, yet it appears by the Teſtimony of a great number of Witneſſes, that the ſaid William Rice did not dye of any poyſoning, but of another horrible diſeaſe, that he had got by his wicked and diſſolute life, which with reverence
Le grand Pox. cannot be ſpoken.

And in this caſe it was reſolved, that if Felony be done, and one hath ſuſpition upon probable matter that another is guilty of it, becauſe that he had part of the Goods robbed, and is indigent, or of evill fame; or if the party be indicted or if Murther be committed, and one is ſeen neer the place, or conuning with a Sword or other Weapon embrued with blood, or that he was in company of Felons, or hath carried the Goods ſtoln to obſcure places, or ſuch like things, theſe are good cauſes of ſuſpition, and by reaſon of this he may arreſt the party ſo ſuſpected, to the end that he may ſubject him to Juſtice.

But in this caſe three things are to be obſerved.

1. That a Felony be done.

2. That he who doth arreſt, hath ſuſpition upon probable cauſe, which may be pleaded and is traverſable.

3. That he himſelf who hath the ſuſpition, arreſt the party.

For he cannot command another to do it, for ſuſpition is a thing individuall and perſonall, and cannot extend to another perſon then to him who hath it.

Alſo it was reſolved, that if Felony be done, and the common fame and voice is that one hath committed it, this is good cauſe for him who knows of it to arreſt the party, to the intent that he may be brought to Juſtice, but none can arreſt the party ſuſpected by the command of him who hath the ſuſpition, and with this agrees the Book in 2 H. 7. 15, 16. 15 H. 7. 5. 20 H. 7. 12. 21 H. 7. 28. 7 Ed. 4. 20. 8 Ed. 4. 27. 11 Ed 4. 4. 6. 17 Ed. 4. 5. 6. 20 Ed. 4. 6. b. 7 H. 4. 25. 27 H. 8. 23. 26 H. 8. 9. 7 Eliz. Dy. 226.

Hill 9 Jac. Regis.

IN this very Term, the Attorney and Sollicitor conſulted with me, if at this day upon conviction of an Heretick before the Ordinary, this Writ De Heretico comburendo lyeth; and it ſeems to me clearly that it doth not, for the reaſons and authorities that I have reported, Trin. 9 Jac. fol. 73. And after they conſulted with Fleming chief Juſtice, Tanfield chief Baron, Williams, and Crook; And they upon the report of Doctor Coſins, mentioned in my ſaid report, and upon certain Preſidents which paſſed in the time of Queen Elizabeth, upon former Preſidents, although the Statute of 2 H. 4. was enforced, and without conſideration (as I have heard) of the Authorities cited by me in my ſaid Report, they certifie the King, that a Writ De heretico comburendo lyeth upon a conviction before the Ordinary, but that the moſt convenient and ſure way was to convict the Hereticke before the high Commiſſioners.

Breve de Heretico comburendo, *lyeth not at this day, &c.*

Paſch. 10 Iac.

The Lord Vaux his Caſe.

IN this Term, the Lord Vaux was indicted of a Premunire in the Kings Bench upon the new Statute, for refuſing the Oath of Alleageance, and upon this he was Arraigned, and Prayed that he might be tryed Per pares.

But it was reſolved, that he ſhall not in this caſe be tryed by his Peers for the Statute of Magna Charta, cap. 29. Nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, is only to be underſtood of Treaſon, Miſpriſion of Treaſon, Petit Treaſon, and Felony, and of Acceſſories to them, &c. But Premunire is but a Contempt, and Pardon of all Contempts pardons it; and for this cauſe it ſhall not be Per pares.

And upon this the Lord Vaux did confeſs the Indictment, vide Lamb. Iuſt. del pace 520. Dalliſons Report accordingly: That of Riots, Routs, unlawfull Aſſemblies, &c. a Peer of the Realm ſhall not be tryed Per pares, vide Stamford, &c.

Trin. 10 Jac.

Counteſſe of Shrewsburies Caſe.

Contempt. IN this Term, before a ſelect Council at York-House, Scil. The Lord Chancellor, the Arch-biſhop, the Duke of Lenox, the Earle of Northampton, Lord privy Seal, the Earle of Suffolk, Lord Chamberlain, the Earl of VVorceſter, the Earle of Pembroke, Viſcount Erskin, Viſcount Rochford, the Lord Zouch, the Lord Knolls, the Lord VVooton, the Chancellor of the Exchequer, the Chancellor of the Dutchy, Fleming chief Juſtice of the Kings Bench, Philips Maſter of the Rolls, Coke chief Juſtice of the common Pleas, and Tanfield chief Baron;

The Counteſſe of Shrewsbury (the Wife of Gilbert, Earl of Shrewsbury) then Priſoner in the Tower was brought before the ſaid Lords, and by the Attorney and Sollicitor of the King, was charged with a high and great contempt of dangerous conſequence; for they declared that the Lady Arbella being of the Blood-Royall, had married Seymer, ſecond Son of the Earl of Hertford, without privy or aſſent of the KING, for which contempt the ſaid Seymer was committed to the Tower, and had eſcaped and fled beyond the Seas; the Lady Arbella being under reſtraint eſcaped alſo, and Embarqued her ſelf upon the Sea, and was taken before ſhe got over; of which flight of the ſaid Lady Arbella, the ſaid Counteſſe being her Aunt, very well knew and abetted, as is directly proved by Crompton, and not denyed by the Lady Arbella: And admit it, that the Lady Arbella had no evill intent againſt the King (who had alwayes a great and ſpeciall care of her, and was very bountifull unto her, untill her marriage with the ſaid Seymer, which was the Pomum vetitum) yet when ſhe fled, and when ſhe ſhould be invironed with evill Spirits, Cum perverſis perverti poſſit, and when ſhe ſhall be in another Sphere, ſhe will move with the ſame Orbe.

And the Lords of the privy Council knowing the Arcana imperii, did ſhew divers perilous conſequences, and the rather for this, that the ſaid Counteſſe is an obſtinate Popiſh Recuſant, and, as was ſaid, perverted alſo the Lady Arbella.

Now the Charge was in two poynts.

1. That the ſaid Counteſſe of Shrewsbury, by commandment of the King, being called to the Council Table, before the Lords of the Council at VVhitehall, and there being required by the Lords to declare her knowledge touching the ſaid poynts, and to diſcover what ſhe knew concerning them, for the ſafety of the King and quiet of the Realm, ſhe anſwered, that ſhe would not make any particular anſwer; And being again asked by the Kings command, by the Council at Lambeth, and being charged again to anſwer to the ſaid poynts, ſhe refuſed, for two cauſes.

1. For that ſhe had made a raſh vow, that ſhe would not declare any thing in particular touching the ſaid poynts; and for that (as ſhe ſaid) it was better to obey God then Man.

2. She

2. She ſtood upon her priviledge of Nobility, ſcil. To anſwer onely when ſhe was called judicially before her Peers, for that ſuch priviledge was allowed (as ſhe ſaid) to VVilliam Earl of Pembroke, and to the Lord Lumley.

2. The ſecond poynt of her charge was, that when ſuch anſwer which ſhe had made was put in Writting, and read to her, yet ſhe refuſed to ſubſcribe to it, which denial to diſcover and diſcharge her conſcience in a caſe which toucheth the ſafety of the King and quiet of the Realm, was urged by the Kings Council to be a great and high contempt, and that Nobility hath not any ſuch priviledge as is alleadged, nor any ſuch allowance as was ſuppoſed; and that raſh and illegal Vowes make not an excuſe, and that this Preſident being now upon the Stage, was of very dangerous conſequence: And the ſaid Counteſſe hearing the charge, yet perſiſted in her obſtinate refuſal, for the ſame reaſons and cauſes upon which ſhe had inſiſted before: And the Lord Chancellor began, and the Arch-biſhop, and all the other Lords began with the firſt, and adjudged it a great and high contempt; and the Lord Chancellor ſaid, that that was againſt the Law of England, with which all the Lords agreed.

And that no ſuch allowance was given to the ſaid Earl of Pembroke, or to the Lord Lumley in reſpect of their priviledge of Nobility, but that they were Voces populi, & ideo non audiendæ: And the Lord Arch-biſhop principally proved, that as well the contempt, as the ſaid raſh Vow was againſt the Law of God, which he and the Earl of Northampton principally proved by divers Texts and Examples in holy Scripture.

And the effect of all that which the three Juſtices ſaid, was, that after the Sentences of all the learned, prudent, and honourable Perſonages and Counſellors of Eſtate, they might well be ſilent; but in regard that Silentium in Senatu eſt vitium, they would ſpeak ſomething, briefly, Viz.

That three things in this caſe are to be well conſidered.

1. Whether the refuſals aforeſaid of the ſaid Counteſſe were Offences in Law againſt the King, his Crown and Dignity.

2. What manner of proceeding this is, and whether it was juſtifiable by Preſident or Reaſon.

3. What is the demerit of the Offences, and how puniſhable.

As to the firſt it was reſolved by the Juſtices and Maſter of the Rolls, that the denying to be examined was a High and a great contempt in Law, againſt the King, his Crown and Dignity; and that if it ſhould be permitted, it would be an occaſion of many High and dangerous Deſignes againſt the King and the Realm, which cannot be diſcovered: And upon hope of Impunity it will be an encouragement to Offenders, as Flemming Juſtice ſaid, to enterprize dangerous attempts.

And the Maſter of the Rolls ſaid, that it was not any priviledge of Nobility, to refuſe to be examined in this caſe, no more then to any Subject.

Alſo, if one that is Noble, and a Peer of the Realm, be ſued in the Star-Chamber, or in Chancery, they ought to anſwer upon their Oathes, and may be examined in the Star-chamber upon Interrogatories upon their Oathes: And if one who is Noble be produced as a Witneſſe between party and party, he ought to be ſworn, or otherwiſe his Teſtimony is of no Value; and ſo is the common experience in the ſaid Courts: And the chief Juſtice ſaid, that foraſmuch as where Order is neglected, confuſion will follow, he would recite ſome of the honourable Priviledges which the Law of England (more then any other Law) attribute to the Nobility

lity of England in legal proceedings; and they will not be impertinent, but give a great light to the caſe now in hand.

1. If a Baron, Viſcount, Earl, or other Lord of Parliament and Peer of the Realm be Plaintiff in any action, and the Defendant will plead that the Plaintiff is not a Baron, Viſcount, Earl, &c. as he is named in the Writ, this ſhall not be tryed at the common Law by Jury, who may be corrupted, nor by Witneſſes, as in the Star-chamber, or Chancery, who may be ſuborned; but it ſhall be tried by the Record in Chancery, which imports by it ſelf ſolid truth; ſo great regard hath the Law to the tryall of their Honour and Dignity, &c.

2. Their perſons have many Honourable Priviledges in Law.

1. At the Suit of a Subject their bodyes ſhall not be arreſted; neither Capias nor Exigent lyeth againſt them.

2. For the Honour and Reverence which the Law gives to Nobility, their Bodyes are not Subject to Torture *in Cauſa criminis Læſæ Majeſtatis.*

3. They are not to be ſworn in Aſſiſes, Juries, or other Inqueſts.

4. If any Servant of the King, named in the Chequer Roll, compaſs or intend to kill any Lord of Parliament, or other Lord of the Kings Council, this is Felony.

5. In the Common Pleas, a Lord of Parliament ſhall have Knights returned on his Jury.

6. He ſhall have day of Grace.

7. A Lord of Parliament ſhall not be tryed in caſe of Treaſon, Felony, or Miſpriſion of them, but by thoſe who are Noble and Peers of the Realm.

8. In Tryal of a Peer, the Lords of Parliament ſhall not ſwear, but they give their Judgment *Super fidem & ligeantiam Domino Regi debitam*, ſo that their faith and alleageance ſtands in equipage with an oath in the caſe of a common perſon in tryal of Life: And the Writs of Parliament directed to the Lords of Parliament, are *Sub fide & ligeantiæ &c.* And the reaſon and cauſe that the King gives them many other Priviledges is for this, becauſe all Honour and Nobility is derived from the King as the true Fountain: And the King honours with Nobility, for two cauſes.

1. *Ad conſulendum*, and for that reaſon he gives them a Robe.

2. *Ad defendendum Regem & Regnum*, and for that cauſe he gives them a Sword.

And forasmuch as they derive their Dignities accompanied with all thoſe Honourable Priviledges from the King, to deny to anſwer, being required thereto by the King, to ſuch poynts as concern the ſafety of the King and quiet of the Realm, is a high contempt and diſobedience, accompanied with great ingratitude.

This

This deniall is contra Ligeantiam ſuam debitam, againſt the faith and alleageance of a perſon Noble, due to the King, and which the Law greatly eſteems.

And that this denying is againſt her faith and allegeance, appears by the ancient Oath of Alleageance, which is imprinted in the heart of every Subject, Scil. Ero verus & fidelis, & veritatem præſtabo Domino Regi de vita & membro & de terreno honore, & vivendum & moriendum contra omnes gentes &c. Et ſi cognoſcam aut audiam de aliquo damno aut malo quod Domino Regi evenire poterit quod non revelabo, &c. And this Oath of Alleageance is common to all Subjects, as well thoſe of the Nobility as Comminalty: But the Law hath greater account of the Faith and Alleageance of a Noble man, then of one of the Commons, for this, that the breach of their alleageance is more dangerous to the King and Eſtate, for Corruptio optimorum eſt peſſima; and for this reaſon, the Counteſſe by her alleageance was bound, without being demanded, to reveal to the King what ſhe knows concerning the Premiſſes, upon which great miſchief may happen to the King and the Realm. But being commanded by the King to declare her knowledge, the denying of it doth greatly aggravate the Offence.

Qui contemnit præceptum, contemnit præcipientem.

Command and obedience are the ligament of Government, and Ligeantia eſt Legis eſſentia; for without alleageance and obedience, the Law cannot proceed.

As to the ſecond point, Viz. concerning the manner of his proceeding.

1. Private, it is not to fine and impriſon, or inflict corporall puniſhment upon the Counteſſe; for fine and impriſonment ought to be aſſeſſed in ſome Court judicially. *Vide* the Earl of Eſſex Caſe, 42, & 43 Eliz. 424.

2. Poſitive, the Fine is Ad monendum, or at the moſt Ad minandum; it is ad inſtruendum, non ad deſtruendum.

This ſelect Council is to expreſſe what puniſhment this Offence juſtly deſerved, if it be judicially proceeded within the Star Chamber; for which reaſon this manner of proceeding is out of the mercy and grace of the King againſt this honourable Lady, that ſhe ſeeing her Offence may ſubmit her ſelf to the King without any puniſhment in any Court judicially.

If Sentence ſhall be given in the Star Chamber according to Juſtice, you the Lords ſhall be Agents in it; But in this manner according to the mercy of the King, the King is only Agent: the Law hath put Rules and Limits to the Juſtice of the King, but not unto his Mercy; that is tranſcendent and without any limits of the Law; Et ideo proceſſus iſte eſt regalis plane & rege dignus.

Alſo inaſmuch as the allegeance and obedience of the Subject, is the beſt Flower in his Imperiall Garland, to the intent, that it may neither be blaſted, nor impaired by this dangerous example, to the prejudice of his Royall Prerogative and Poſterity, this Proceeding hath been thought neceſſary: And this is fortified by the Preſident of the Earl of Eſſex, againſt whom ſuch proceedings were in this very place, An 42. & 43. Eliz. Reg.

And as to the laſt point it was reſolved by all Quaſi una voce, that if a Sentence ſhould be given in the Star Chamber judicially, ſhe ſhould be fined twenty thouſand pound, and impriſoned during the Kings pleaſure.

Trin. 10 Jacobi. Regis.

Robert Scarlets Caſe.

NOte, that at Seſſions of Peace held lately at Woodbridge in the County of Suffolk, the Sheriff returned a grand inqueſt, of which one Robert Scarlet, in the County of Suffolk, had requeſted to be one, but the Sheriff, knowing the malice of the man, refuſed to return him; but notwithſtanding by Confederacy with the Clerk who read the Pannel, he was ſworn of the Grand Inqueſt, and was not returned by the Sheriff; and being amongſt them of the Grand inqueſt, and as one of them, of his malice, and upon his own knowledge, as he pretended (to whom the reſt gave credit) indicted ſeventeen honeſt men, upon divers penall Laws; and ſome of the Juſtices loking over the Bills, found by the Grand Inqueſt, and perceiving ſo many honeſt men to be indicted, as they did think, maliciouſly, demanded of them of the Inqueſt, what evidence they had to find the ſaid Bills, and they anſwered, By the teſtimony and Cognizance of one of themſelves, ſcil, of Robert Scarlet: And upon examination it did appear, that the ſaid Robert Scarlet was not returned, but that he by confederacy betwixt him and the Clerk, procured himſelf to be ſworn of the ſaid Grand Inqueſt, with intent to indict his Neighbours maliciouſly, for which offence he was indicted at Summer Aſſiſes, A. 10 Jac. held at Bury, upon the Statute 11 H. 4. cap. 9. by which it is provided that no Indictment ſhal be found by any perſons named to the Juſtices, without due return of the Sheriff, but by inqueſt of lawfull Liege people of the King, in ſuch manner as was uſed in the time of his Noble Progenitors, returned by the Sheriff, &c. without any denomination, &c. And if any Indictment be made hereafter in any point contrary, that the Indictment ſhall be void, and for ever held Nul.

And upon this Act of 11 H. 4. the ſaid Robert Scarlet was indicted, and he pleaded not guilty. And all the ſpeciall matter aforeſaid was proved in evidence; and upon this he was found guilty by a ſubſtantiall Jury: And in this caſe conſideration was had of divers points.

1. Whether the Juſtices of Aſſiſe have power to puniſh this Offence, or no; and it was held affirmatively, ſcil. by force of their Commiſſion of Oyer and Terminer, for that the ſaid Commiſſion gives them power Ad inquirendum inter alia de omnibus falſitatibus, negligentiis, &c. & aliis malefactis, offenſis & injurijs quibuſcunque, and of them to hear and determine; and this is underſtood as well of offences againſt an Act of Parliament, as againſt the common Law; And for that that it is commonly uſed, that Indictments of non-reſidency of Parſons, Vicars, &c. upon the Statute of 21 H. 8. are taken before the Juſtices of Aſſiſe, by force of this word in the ſaid Commiſſion of Oyer and Terminer, Viz. Negligentijs, &c. ſo that if the Act be indefinite or generall, and doth not give Juriſdiction to any certain Courts in ſpeciall (for then the Act is to be purſued) the generall words of the Commiſſion of Oyer and Terminer extends to it: And it was well obſerved, that in the Commiſſion of the Peace, the ſaid generall words, ſcil. De omnibus & ſingulis alijs malefactis & offenſis have a qualification, ſcil. de quibus Juſtitiarij de pace legitimè inquirere poſſint aut debent, which limitation proves the large extent

of

of the words, when they ſtand without any qualification.

Vide 7 Eliz. Dyer, Commiſſioners of Oyer and Terminer may enquire of Offences againſt penal Statutes, unleſſe that the Statute appoints them to be determined in any Court of Record; and the opinion there, that, in any Courts of Record of the King, are reſtrained to the four Ordinary Courts of Record at Weſtminſter, is not held for Law; and continuall experience hath been allwaies againſt it, as the Statute 5 Ed. 6. 14. of Foreſtallers, Ingroſſers, Regrators gives the penalty to be recovered in any Court of Record: And Juſtices of Aſſiſe in reſpect of their Commiſſion of Oyer and Terminer have allwaies enquired of them, the Statute 33 H. 8. 9. of unlawfull Games, And the Statute of Woods, 35 H. 8. cap 17. and many other Statutes; and ſo the Quære is well reſolved in 7 Eliz. For the opinion of Eallin Saunders, and Whiddon, there it is held at this day for good Law.

2. The ſecond conſideration was had upon the Statute of 11 H. 4. cap. 9. and it was held, that the ſaid Robert Scarlet was an Offender within the Statute, for it is to be underſtood, that the ſaid Statute is partly affirmative of the Common Law, and partly a new Law.

In affirmance of the Common Law, in part privative, No Indictment ſhall be found by any perſon named to the Iuſtices: and in part Poſitive, But by inqueſt of lawfull people of the King, returned by the Sheriff. And that this was in affirmance of the Common Law, the Statute proves it, in the manner as was uſed in the time of his Noble Progenitors: And in the Preamble it is ſaid, againſt the courſe of Common Law uſed and accuſtomed before this time: And that the ſaid Robert Scarlet was an Offender againſt the ſaid Act, for this, that he knowing that he was not returned of the Grand Inqueſt, procured himſelf by falſe conſpiracy to be ſworn, as is aforeſaid. And although that a perſon ſolely was in ſuch undue and unlawfull manner ſworn of the Grand Inqueſt, yet this was within the Act; and by conſequence an offence againſt the Common Law, for that malice and falſneſſe alone may be of great miſchief, as appears in this caſe.

3. The third conſideration was had of 3 H. 8. 10. which alters the ſaid Act of the 11 H. 4. in part, as to denomination; For by the Act of the 3 H. 8. the Juſtices of the Goal-delivery or Juſtices of Peace, of whom one to be of the Quorum, in open Court may alter the Pannel returned by the Sheriff to enquire of the King only, by addition or extraction of any Jurors ſo returned; And they have power to command the Sheriffe to put other in the Pannel, according to their diſcretion: And the Sheriff ought to return the Pannel ſo reformed upon the penalty of the ſaid Act, ſo that none can be of any Grand Inqueſt but by the return of the Sheriff; and for this, the Act of 3 H. 8. cap. 10. hath not altered the Law, as to the offence of Robert Scarlet.

4. The ſaid Act 11 H. 4. hath made a new Law, ſcil. That any Indictment found againſt the Act ſhall be void, which branch doth not make void any Indictment or preſentment, that in the nature of an Indictment found any point contrary to the ſaid Act, is made void by the ſaid Act, ſo that this may draw in queſtion all the Indictments found at the ſame Seſſions: And for this Judgment was given that he ſhould be fined and impriſoned.

Baker

Trin. 10 Jac.

Baker and Halls Caſe.

Star-chamber

NOte that upon conſideration of the Statute of 3 H. 7. cap, 14. It was reſolved by Coke cheif Juſtice of the Common Pleas Yelverton, Williams, Snig, and others ; That whereas it is provided, that what perſon ſoever who takes a Woman ſo againſt her will, &c. although that the body of the act extend to taking only, yet in reſpect of this word (ſo) it hath relation to the Preamble (to ſuch perſon as is deſcribed in the Preamble, ſcil. Having ſubſtance) it was agreed by all, that if the Wife hath nothing, nor his Heir apparent, it is out of the Statute, for the Statute would not have been ſo curious in deſcribing the perſon, and all in vain.

2. This word (So) relates to the quality and event of the taking, mentioned in the Preamble, Scil. to be married, or defiled, for if ſhe be not married or defiled, it is not ſuch a taking (ſo) id eſt, ſo married, or ſo defiled ; and it is not reaſonable that So ſhal have relation to the taking, which is more remote, and not to the marriage or the defiling, which is neerer Quod fuit conceſſum, &c. and Clergy is taken away by the Statute of 38 Eliz. cap. 9. for Principals or Procurors before, Vide Stamford, fol. 37. b, accordingly : And ſo was the Law taken in the 3 and 4 Ph. & Mar. as Juſtice Dalliſon reports vide Lamb. 252. Juſtice of Peace.

Note, the Receivers of the Woman are Principals, but not the Receivers of them who took the Woman, for theſe are but Acceſſories, vide Lamb. ibid.

Priviledge of Prieſts.

NOte, that I ſaw a Report in the time of Queen Mary, upon the Statute 50 Ed 3, cap, 5 & 1 R. 2, c. 15. concerning the arreſting of them in holy Church, that the ſaid Statutes are, but an affirmance of the Common Law, and in maintenance of the liberties of holy Church, as appears by the preamble of the ſame Statutes, and there held, that Eundo, rede dundo & morando, for to celebrate Divine Service, the Prieſt ought not to be arreſted, nor any who aid him in it : as the caſe was of one who admitted the Prieſt to Sing Maſſe, and that the party grieved may have an action upon the Statute, 50 Ed. 3. for when any thing is prohibited by an act, although that the act doth not give an action, yet action lyeth upon it; as upon the Statute of Marlb. which prohibits to take in the high way, or Articuli ſuper Chartas 3. which prohibites the Court of Marſhalſey to hold Plea, &c. although that theſe Acts do not give action, yet an action lyeth. 7 A. 6. 30 &c. and the Statute 2 H. 5. which commands a Libell to be delivered 4 Ed 4. 37. vide Regiſtrum in Bre. 6 ſuper Stat.

Crown.

NOte, if a man be convicted, or hath Judgement of death for a Felony, he ſhall never anſwer by the Common Law, to any Felony don before the Attainder, ſo long as the Attainder remains in force, vide 8 Eliz. cap 4. 18 Eliz. 7. And at this day, if a man be adjudged to be hanged, and hath his pardon, he ſhall never anſwer to any Felony before, for he cannot have two Judgments to be hanged. Aliter, if the firſt Attainder be reverſed by Error : So if a man be Out-lawed, and by that Attaint of Felony he

he cannot be arraigned of any Felony before, for he cannot be twice attaint, vide 10 H. 4. Coron. 227. case del appeal, &c.

A Man seised of a Mannor to which he hath Stray appendent by prescription, &c. by his Baily he seiseth an Ox as a Stray within the Mannor, and makes Proclamations according to Law; and within the year and day lets the Mannor with all Royalties, Liberties, and after the year and day passed: And Dyer Serjeant did move the Court, who should have the estray; And Brown Justice was of Opinion, that the Lessor should have it, forasmuch as he had the possession; and when the year and day are passed, the Property shall have relation to the time of the first Seisure: But all the Justices were against him, and that the Lessee shall have it, forasmuch as the property of the Stray is not altered nor changed before the year and day: And the Lord of the Mannor, untill the year and day are past, hath but the Custody, so that the Owner may re have it alwayes within the year and day, if he will pay for the meat of it: Nor can the Ox be laboured or used by the Lord before the year and day, and therefore he shall be paid for the meat, unlesse it be such a Beast as of necessity ought to be used, as a Milch Cow, &c. And it was held, that if one take a Stray within a year and a day, if it Stray out of the Mannor, the Lord may re-take it before Seisure.

IN the case of Doctor Hutchinson, Parson of Kenn, in the County of Devon, It was resolved Per totam Curiam, that if any shall receive or take Money, Fee, reward or other profit, for any presentation to a Benefice with Cure, although in truth he which is presented be not knowing of it, yet the presentation, admission, and induction are void Per expressa verba Statuti of 31 H. 8. cap. 6. and the King shall have the presentation Hac vice, for the Statute intends to inflict punishment upon the Patron, as upon the Author of this Corruption, by the loss of his presentation, and upon the Incumbent, who came in by such a corrupt Patron, by the losse of his Incumbency, although that he never knew of it; but if the Presentée be not Cognizant of the corruption, then he shall not be within the clause of disability in the same Statute: And so it was resolved by all the Justices in Fleetstreet, Mich. 8. Jac. fol. 7. vide verba Statuti, which are very well penned against the avarice of corrupt Patrons. Simony, Sta. 31 Eliz.

Hugh Manneys Case.

IN an Information in the Exchequer against Hugh Manney Esquire the Father, and Hugh Manney the Son, for intrusion and cutting of a great number of Trees in the County of Merioneth, the Defendants plead Not guilty: And Rowland ap Eliza Esquire, was produced as a Witnesse for the King, and deposed upon his Oath to the Jurors, that Hugh the Father and the Son joyned in sale of the said Trees, and commanded the Tenders to cut them down, upon which the Jurors found for the King with great damages; And judgment upon this was given, and execution had of a great part. Perjury.

And Hugh Manney the Father exhibited a Bill in the Star-chamber at the common Law, against Rowland ap Eliza, and did assign the Perjury in this, that the said Hugh the Father did never joyn in sale, nor

command the Vendees to cut the Trees ; and the said Rowland ap Eliza was by all the Lords in the Star-chamber convict of corrupt and wilfull Perjury : And it was resolved by all, that it was by the common Law punishable before any Statute : And although that the Witnesse depose for the King, yet he shall the rather be punished then for another, for the King is the Head and Fountain of Justice and Right ; and he who perjures himself for the King, doth more offend then if it was in the case of a Subject.

Haye's Case, in Curia Wardorum.

BY Inquisition in the County of Middlesex An. 6. Jac. by vertue of a Diem clausit extremum, after the Death of Humphrey Wilward, it was found that the said Humphrey died seised of a Messuage and twenty six acres of Land in Stepney ; and that John Wilward was his Heir, and of the age of fourteen years and nine dayes ; and that the Land was held of the King in Capite, by Knights-service. John Wilward died within age, and by inquisition in Mid. 8. Junii An. Jac. by vertue of a Writ of Deveneront, after the death of the said John Wilward, it was found that the said John died seised in Ward to the King, and that the said Messuages and Lands at the time of the death of the said John, were holden of the Dean of Pauls, as of his Manor of Shadwell.

All the mean Rates incurred in the life of John VVilward, are paid to the King.

The Questions are,

1. Whether by the Death of the said Iohn, and finding of the mean Tenure in the Deveneront, the first Office granted to Points be determined?

2. Whether the Tenure found by the first Office may be traversed?

And as to these Questions, it was resolved by the two chief Justices and chief Baron, that where the said John dyed, the Office found by force of the said Writ of Diem clausit extremum, after the death of Humphrey VVilward, whereby the King was entituled to the Guardianship of the said John, hath taken its effect and is executed, and does remain as evidence for the King after the death of the said John, but nevertheless is not traversable, for it is traversable during the time it remaines in force onely, and the Jurors upon the Deveneront after the death of the said John, are at liberty to find the certainty of the Tenure, and they are not concluded by the first Inquisition, for they are sworn Ad veritatem dicendum, and with this agrees, 1 H. 4. 68. And all this appeares by the diversity betwixt the Writ of Diem clausit extremum, and the Writ of Deveneront : And it is to be observed, that there is no difference betwixt the Writ of Diem clausit extremum, and the Writ of Deveneront, but in one poynt ; to wit, the Diem

Diem clauſit extremum is generall. Viz. Quantum terrarum & tenementorum idem H. tenuit de nobis in capite, &c. die quo obiit, & quantum de aliis generally ; and the Deveneront recites quod I. filius & Hæres H. qui de nobis tenuit in Capite, nuper dum fuit infra ætatem, & in cuſtodia noſtra fuit, Diem clauſit extremum, ut accipimus : tibi præcipimus, quod per Sacramentum 12. inquiras, quæ terræ & tenementa per mortem prædicti H. & ratione minoris ætatis prædicti I. ad manus noſtras Deveneront, &c. So that this Writ is not generall, but does reſtrain only the Lands and Tenements, Quod Deveneront, &c. and all the other poynts of the ſaid Writ do relate to the Lands and Tenements, Quæ Deveneront, &c. by which it appears, that the firſt Inquiſition is not ſo concluſive, but that by the expreſs Rules of the Writ, the Jurors are at large to find the truth of the Tenure, notwithſtanding the firſt Office. And ſo it was reſolved and decreed accordingly, nono Jacobi, in the Court of Wards in the caſe of Dune Lewes.

Award of Capias utlegatum by Juſtices of the Peace.

IN the ſame Term, the opinion of all the Court of common Pleas was, that if one be Out-lawed before the Juſtices of Aſſiſe, or Juſtices of Peace, upon an Indictment of Felony, that they may award a Capias utlegarum, and ſo was the Opinion of Periam chief Baron, and all the Court of the Exchequer as to the Juſtices of Peace, for they that have power to award proceſſe of Out-lawry, have alſo power to award a Capias utlegatum, as incident to their Authority and Juriſdiction : ſee the Statute of the 34 H. 8. cap. 14. for certificate of a ſhort Tranſcript of every Attainder, Conviction, or Out-lawry of Felony, by the Clerks of the Aſſiſes, Clerks of the Peace, &c. into the Kings Bench, on penalty of forty ſhillings, &c. And note well, that ſuch Tranſcript is by the ſaid Act made to be of as great force as the Record it ſelf : See Lambert in his Juſtice of Peace, fol. 563. contra, but ſee 1 Ed. 6. cap. 1. Juſtices of Peace in caſe of profanation of the Sacrament ſhall award a Capias utlegatum throughout all England.

Herſey's Caſe, Star-chamber.

IOhn Herſey Gent. exhibited his Bill in the Star-chamber, againſt Anthony Barker Knight, Thomas Barker, Councellor of Law, Robert VVright, Doctor of Divinity, Ravenſcroft Clerk, and John Haynes ; and did thereby charge the Defendants with the forging of the Will of one Margery Pain, and the cauſe came to hearing, Ad requiſitionem Defendentium, and upon hearing of the Plaintiffs Councel, there appeared no purpoſe or preſumption againſt the Defendants, or any of them, but that the Teſtament was duly proved in the Eccleſiaſtical Court, and upon an appeal was alſo affirmed before Commiſſioners Delegates, and had alſo been decreed in the Chancery ; ſo that it appeared to the Court, that the ſaid Bill was preferred of meer malice and ſpite, to ſlander the Defendants without any colour, and becauſe the Defendants had no remedy at the common Law for the ſaid ſlander, and if ſuch ſlander ſhould paſſe unpu-

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nisht, it may encourage malicious men to make this Court as a Pasquil, to fix therein a Libell of Record to charge those that are innocent with haynous Crimes, to remain to all perpetuity.

In this cause it was resolved by the Court, that by the course of the Court, and according to former Presidents, the Court may give dammages to the Defendants, and so was it done, Viz. two hundred pound to the Doctor of Divinity, two hundred marks to the Knight, forty pound to the Clerke, a hundred and twenty pound to the Woman, and it was said, that Creare ex nihilo, quando est bonum, est divinum; sed creare aliquid ex nihilo, quando est malum, est diabolicum; & plus Maledicite nocent, quam Benedicite docent.

Hill. 2. Jac.

THeodore Thomlinson had brought an Action of Account for Goods against one Philips in the common Pleas, and thereupon Philips sued Thomlinson in the Court of the Admiralty, supposing the Goods to have been retrived in forraign parts beyond the Seas: and the said Thomlinson being committed for refusing to answer upon his Oath to some Interrogatories there proposed to him, brought his Habeas Corpus, which was returned thus, Ego William Pope Marescallus supremæ Curiæ Admiralitatis Angliæ Dom. Justic. Serenissi. Reginæ nostræ in brevi huic Schedulæ annex. specificat. Certific. quod infra vocat. Theodore Thomlinson ante advent. istius brevis capt. fuit & custodiæ meæ commiss. ex eo quod dictus Theodorus Thomlinson vinculo sacramenti coram Judice Admiralitatis Angliæ astrictus ad respondend. quibusdam Articulis contra eum in dicta Cur. dat. &c. sub pœna quinque librarum, &c. contumaciter examen suum subire recusavit, Idcirco, &c. And it was resolved by the Court of Common Pleas;

1. That the Court of Admiralty hath no Cognizance of things done beyond Sea, and this appears plainly by the Statute of 13 Rich. 2. cap 5. the words of which Statute are, that the Admirals and their Deputies shall not medle from henceforth of any thing done within the Realm, but onely of a thing done upon the Sea, Vide. 19 H. 6. fol. 7. For things transitory done beyond the Seas, are either tryable in the Kings Courts, or the party grieved may have his remedy before the Justices where the Fact was done beyond Seas.

2. That the proceedings in the Court of the Admiralty are according to the course of the civil Law, and therefore the Court is not of Record, and by consequence cannot assesse any fine in such case, as Judges of a Court of Record may do.

3. That the return above mentioned was insufficient, as being too generall, because it is not specified for what cause or matter Thomlinson was examined, so as it might appear that the Interrogatories were of such things, as were within their Jurisdiction, and that the party ought by Law to answer upon his Oath, for otherwise he might very well refuse.

This Case was intended to have been inserted by my Lord Coke *into his seaventh Report, but not then published, because the King commanded that it should not be Printed, but the Judges resolved* ut supra.

Right

Right to Seats in the Church.

Corvens Caſe

COrven did Libell againſt Pym, an Attorney of this Court, for a Seat in a Church in the County of Devon; And Pym by Serjeant Hutton, moved the Court to have a Prohibition upon this reaſon, that himſelf is ſeiſed of a houſe in the ſaid Pariſh, and that he, and all thoſe whoſe Eſtate he hath in the houſe, have had a Seat in an Iſle of the Church: And it was reſolved by the Court, that if a Lord of a Mannor, or other perſon, who hath a houſe and Land in the Pariſh, time out of mind, and had a Seat in an Iſle of the ſame Church, ſo that the Iſle is ſole and proper to his Family, and they have maintained it at their own Charges, that if the Biſhop would diſpoſſeſſe him, he ſhall have a Prohibition, for it ſhall be intended that the partie's Anceſtors, or thoſe whoſe Eſtate he hath, have erected and built the Iſle with the aſſent of the Parſon, Patron, and Ordinary, to the intent to have it only to himſelf. But for a Seat in the body of the Church, if a queſtion ariſeth concerning it, it is to be decided by the Ordinary, becauſe the Free-hold is to the Parſon, and the place is dedicated and conſecrated to the Service of God, and is common to all the Inhabitants; And therfore it belongs to the Biſhop to order it in ſuch manner as the Service of God may be beſt celebrated, and that there be no contention in the Church. And it is to be preſumed, that the Ordinary, who hath the cure of Souls, will take order in ſuch caſes, according to right and conveniency; that is to ſay, to take care that Gentlemen may have places fit for them, and the poor people fit places for them alſo; And the ordering therof is a matter meerly Spirituall; and with this agrees 8 H. 7. 12. and the chief Juſtice cited the caſe of Dame Wiche in 9 H. 4. 14, and ſaid, the caſe there was, that the Lady brought a Bill in the Kings Bench againſt a Parſon, Quare unam Tunicam vocatam a Coat-armor & Pennons with the Armes of the ſaid Sir Hugh Wiche her Huſband, and a Sword in a Chappel where he was buried.

And the Parſon claimed them as Oblations, and therfore that they did belong to him: And there it is holden, that if one uſe to ſit in the Chancel, and hath there a place, his Carpet, Livery, and Cuſhion, the Parſon cannot claim them as Oblations, neither ought he to have the ſaid things, for that they were hanged there in honour of the deceaſed; and therfore, by the ſame reaſon, although a Grave-ſtone, Coat of Armor, Tomb, &c. are annexed to the Free-hold of the Parſon, yet in regard the Church is free to all the Inhabitants for burying, the Parſon cannot take them.

And the cheif Juſtice ſaid, that the Lady might have a good action during her life, in the caſe aforeſaid, becauſe ſhe her ſelf cauſed the ſaid things to be ſet up there, and after her death, the Heir to be deceaſed ſhall alſo have his Action, becauſe that (as the Book ſaies) they were hanged there for the honour of his Anceſtor, and therfore they are in the nature of Hirelomes, which by the Common Law belong to the Heir, as being the Principall of the Family: The like Law of a Grave-ſtone, Tomb, and the like.

And this agrees with the Laws of other Nations, Bartho. Caſſaneus, fol 13. Concl. 29. Action dat. ſi aliquis arma, in aliquo loco poſita, deleat ſive abraſit, &c. & in 21 Ed. 3. 48. in the Biſhop of Carliles caſe, it appeared,

that the Ornaments of the Chappel of a preceding Bishop, do belong to the succeeding Bishop, and are meerly in succession, although that other Chattels, in case of a sole Corporation, do belong to the Executors of the deceased party, and shall not goe in succession: so in the other case, things erected in the in the Church for the honour of the dead person, shall go to his Heirs, as Hirelomes, as in manner of an Inheritance.

Note, that in Easter Terme, 10 Jacobi, It was resolved in the Court of Star-chamber, in the case between Hussey and Katherine Leyton, and others, that if a man have a House in any Parish, and time out of mind he and all those whose Estate he hath, have used to have a certain Pew in the Church, that if the Ordinary will displace him, he shall have a Prohibition, for if he hath it by prescription, he has as good right in the Seat, as he hath in his house; but observe that he must claim it as belonging to his house, and not in other manner: for properly it belongs to the Inhabitants in the Manor House, if any Manor be, and not to the Manor which includes other Tenants, Farmers, and Inhabitants: But true it is, that the Ordinary shall dispose of common and vulgar Seats in the Church, where there is no such prescription, as is aforesaid.

Earl of Shrewsburies Case.

Ireland. By force of certain Letters (bearing date 28 Martij 1612) of the Lords of the privy Councill, directed to Sir Humphrey Winch, Sir James Ley, Sir Anthony Saintleger, and Sir James Hulleston; they did certifie to their Lordships the Claim of Gilbert, Earl of Shrewsbury, to the Dignities of the Earldome of Waterford, and Barony of Dungarvan in Ireland, in such manner as followeth;

King Henry the firth, by his Letters Patents, in the twentieth year of his Raign, did grant to his thrice beloved Colin John Earl of Shrewesbury, in consideration of his approved and loyall Services, in the City and County of Waterford, Pro eo quoque quod eundem consanguineum nostrum prædicta terra nostra Hiberniæ in partibus illis contra inimicorum & Rebellium nostrorum insultus potentiùs defendat, ipsum in Comitem Waterford, una cum stilo & titulo ac nomine & honore eidem debitis ordinamus & creamus habendum to the said Earl and his Heirs Males of his body; and further by the said Letters Patents, did grant the Castles, Lord-ships, Honours, Lands, and Manors of Dungervan to the said Earl and the Heirs Males of his body, to hold the Premisses of the King and his Heirs, by Homage and Fealty, and by the Service of being his Majesties Seneschall in the Realm of Ireland: Afterwards in the Parliament called Des absentees, holden at Dublin in Ireland the tenth of May, the twenty eighth of Henry the eight, by reason of the long absence of George Earl of Shrewsbury out of the said Realm; It was enacted, that the King his Heirs and Assignes, shall have and enjoy in right of his Crown of Engl. all Honours, Manors, Castles Lordships, Franchises, Hundreds, Liberties, Count-palatines, Jurisdictions, Annuities, Fees of Knights, Lands, Tenements &c. & all & singular Possessions, Hereditaments, and all other Profits, as well Spirituall as Temporall whatsoever, which the the said George Earl of Shrewsbury and Waterford, or any other person or persons hid to his use, &c. King Henry the eighth, by his Letters Patents, the twenty ninth of his Raign, reciting the said Statute De Absentees,

Nos

Nos præmiſſa conſiderantes, & nolentes ſtatum, honorem, & dignitatem prædicti Comitis diminuere, ſed amplius augere, de certa ſcientia & mero motu, &c. did grant to the ſaid Earl and his Heirs, the Abby of Rufford, with the Lands thereto belonging in the County of Nottingham, and the Lordſhip of Rotheram in the County of York, the Abbies of Cheſterfield, Shirbrook, and Gloſſadel in the County of Derby, with divers other Lands and Tenements of great value, to be holden in Capite: And the queſtions were;

1. Whether by the long abſence of the Earl of Shrewsbury out of Ireland, by reaſon wherof the King and his Subjects wanted their defence and aſſiſtance there, the Title of the Honour be loſt or forfeited, the ſaid Earl being Peer of both Realms, and reſiding here in England.

2. Whether by the ſaid Act De Abſentees, An: 28 H. 8. the Title of the Dignity of the Earl of Waterford, be taken from the ſaid Earl, as well as the Mannors, Lands, Tenements, and other Hereditaments in the ſaid Act ſpecified.

And afterwards by others Letters Patents of the Lords of the Council, dated the twenty ſeventh of September 1612. the two chief Juſtices and the chief Baron were required to conſider of the caſe, which was incloſed within their Letters, and were to certifie their opinions of the ſame.

Which caſe was argued by Counſel learned in the Law, in behalf of the ſaid Earl, before the ſaid chief Juſtices and cheif Baron, upon which they having taken great conſideration and adviſement, after they had read the Preamble, and all the ſaid Act of the 28 of H. 8. It was unanimouſly reſolved by them all, as followeth;

As to the firſt it was reſolved, that foraſmuch as it does not appear what defence was requiſite, and that the conſideration Executory was not found by Office to be broken as to that point, the ſaid Earl of Shrewsbury notwithſtanding does remain Earl of Waterford.

As to the ſecond, it was reſolved, that the ſaid act of the twenty eighth of H. 8. De Abſentees, doth not only take away the poſſeſſions which were given to him at the time of his creation, but alſo the dignity it ſelf, for although one may have a dignity without any Poſſeſſions Ad ſuſtinendum nomen & onus, yet it is very inconvenient that Dignity ſhould be cloathed with Poverty: And in caſes of Writs, and ſuch other legall proceedings, he is accounted in Law a Noble man, and ſo ought to be called, in reſpect of his Dignity, but yet if he want Poſſeſſions to maintain his Eſtate, he cannot preſſe the King in juſtice to grant him a Writ to call him to the Parliament; and ſo was it reſolved in the caſe of the Lord Ogle, in the Raign of Ed: the ſixth, as the Baron of Burleigh, Lord Treaſurer of England, at the Parliament An: 35 Eliz. did report: And therfore the act of the 28 H. 8. (as all other Acts ought to be) ſhall be expounded to take away all inconvenience, and therfore by the generall words of the Act, Viz, of Honours and Hereditaments, the Dignity it ſelfe, with the Lands given for mantenance of it, are given to the King, and the Dignity is extinct in the Crown: And the cauſe of degradation of George Nevill Duke of Bedford, is worthy the obſervation, which was done by force of an Act of Parliament, 16. June 17 Ed: 4. which Act reciting the making of the ſaid George Duke, doth expreſſe the cauſe of his degradation in theſe words: And forſomuch as it is openly known, that the ſaid George hath not, or by Inheritance may have any livelyhood to ſupport the ſaid Name, Eſtate, and Dignity, or any name of Eſtate; And often times it is ſo ſeen, that when any Lord is called to high Eſtate, and hath not convenient livelyhood to ſupport the ſame Dignity, it inducеth great poverty and indigence, and cauſeth

Honour taken away for poverty.

seth often-times great Extortion, Imbracery, and Maintenance to be had, to the great trouble of all such Countries where such Estate shall happen to be: Wherfore the King by advice of his Lords Spirituall and Temporall, and by the Commons in this present Parliament assembled, and by the authority of the same, ordaineth, establisheth, and enacteth, that from henceforth the same Creation and making of the said Duke, and all the names of Dignity given to the said George, or to John Nevill, his Father, be from henceforth void and of none effect, &c. In which Act, these things are to be observed.

1. That although the Duke had not any Possessions to support his Dignity, yet his Dignity cannot be taken from him without an Act of Parliament.

2. The Inconveniences do appear, where a great State and Dignity is, and no livelyhood to maintain it.

3. It is good reason to take away such Dignity by Act of Parliament, and therfore the said Act of the 28 H. 8. shall be expounded according to the generall words of the Writ, to take away such inconvenience: And although the said Earl of Shrewsbury be not only of great Honur and Vertue, but also of great Possessions in England, yet it was not the intention of the Act to continue him Earl in Ireland, when as his Possessions in Ireland were taken away from him, but that the King at his pleasure might confer as well the Dignity as the Possessions to any other, for the defence of the said Realm. And the said Letters Patents de Anno 29 H. 8. hath no words to restore the Dignity, which the Act of Parliament hath taken away; but it was not the intent of the King *Diminuere statum, honorem, & dignitatem ipsius Comitis*, but *augere* his Possessions for maintenance of his Dignity, for so much appears by this word *Augere*; for he doth by the said Letters Patents, with exceeding great bounty, increase the Revenues of the said Earl in England, which the King did think was an encrease of large Possessions in England, instead of all that which was taken away from him by the Act of the 28 H. 8.

And whereas it was objected, that the generall words Honors and Hereditaments are explained and qualified by the said words Relative subsequent, Which the said George, or any to his use hath; and therefore it shall not be intended of any Honour or Hereditament, but of such whereof others are seised to his use, and no man can be seised of the Dignity, and therfore that the said Act doth not extend to it: but that it is to be understood Reddendo singula singulis, and these words Which the said George Earl hath, are sufficient to passe the Dignity, and with this agrees the opinion of all the Judges of England in Nevil's case upon the like words in the Statute of the 28 H. 8 in the seventh part of my Reports, fol. 33, & 34.

Hil.

Hill. 2 Iac.

Jurisdiction of the Court of Common Pleas.

In the last Terme, by commandment of the King, the Justices of the Kings Bench, and the Barons of the Exchequer, were assembled before the Lord Chancellor Elsmer at Yorke-House, to deliver their Opinions, whether there was any authority in our Books, that the Justices of the common Bench may upon information made to the Court (which commonly is called suggestion) grant Prohibitions, or whether of necessity every Plea ought to be pending in the Court for such cause, and the King would know their Opinions in this case: And the Judges toke time to deliver their Opinions untill this Terme. And then Fleming chiefe Justice, Tanfield chiefe Baron, Snig, Altham, Crook, Bromley, and Doderidge, (Yelverton and Williams Justices being dead since the last Terme) did deliver their Opinions to the said Lord Chancellor. That the Presidents of each Court are sufficient Warrants for their proceedings in the same Court; and therefore as well in the Kings Bench and in the Exchequer, as in the common Bench, the Judiciall Presidents in them are good Warrants of their proceedings, and therefore for a long time, and in many successions of reverend Judges, Prohibitions upon information, without any other Plea pending have been granted, Issues tried, Verdicts and Judgments given upon Demurrer; all which being in force, they were unanimously agreed to give no Opinion against the Jurisdiction of the Court of the common Bench in this case, and none of the Judges of the common Bench were called, or present at any conference concerning this matter, and yet Laqueus confractus est, & nos liberati sumus. Et, magna est veritas & prævalet: See my particular Treatise of the Jurisdiction of the common Bench in this point, by which the Jurisdiction of that Court evidently appears.

Hill. 10. Jac.

Parliament in Ireland.

The Lords of the Councell did write to the two chiefe Justices and the Baron in these words, After our hearty commendations to your Lordships: Whereas his Majesty for divers weighty considerations hath resolved to hold a Parliament within the Realm of Ireland: And that by an Act made in the tenth year of H. 7. called Poynings Act, It is provided, That all such Bills as shall be offered to the Parliament there, shall be first transcribed hither under the great Seale of that Kingdome, and having received allowance and approbation here, shall be put under the great Seal of this Kingdome, and so returned thither to be preferred to the Parliament, forasmuch as there are accordingly transferred hither from thence

divers Bills, as well publick as private, ſome of which Bills were firſt agreed on here, ſome others were framed and conceived there, and comming now hither may happily receive amendment and alteration; We have thought meet for avoidance of any Queſtion, or inconvenience that may ariſe of the manner and form of proceedings in amending or altering of thoſe Bills, hereby to pray and require you, calling to you his Majeſties Attorney and Solicitor, to looke into Poynings Act, and to conſider of ſuch courſe as ſhall be fit to be held concerning the ſame, &c. *Dat. ultimo Junii*, 1612. Upon which in this Term the ſaid chief Juſtices, chief Baron, Attorney, and Solicitor generall were aſſembled two ſeverall dayes at Serjeants Inn; and they had not only conſidered of the 10 H. 7. cap. 4. called Poynings Act; but alſo of an Act made in the Realm of IRELAND, 3 and 4 Phil. and Mar. cap. 4. intituled, An act declaring how Poynings act ſhall be expounded and taken: For by the ſaid Act of the 10 H. 7. it is provided, that no Parliament be hereafter holden in the ſaid Land of Ireland, but at ſuch ſeaſons as the Kings Lievtenant and Councell there firſt do certifie the King under the great Seale of that land, the cauſes and conſiderations, and all ſuch Acts as to them ſeemeth ſhould paſſe in the ſaid Parliament: And ſuch Cauſes, Conſiderations, and Acts affirmed by the King and his Councell, to be good and expedient for the Land, and his Licenſe thereupon, as well in affirmation of the ſaid cauſes and Acts, as to ſummon the ſaid Parliament under the great Seale of England had and obtained: That done, a Parliament to be had and holden after the forme and effect before rehearſed: And if any Parliament be holden in that Land hereafter, contrary to the forme and proviſion aforeſaid, it be deemed void and of none effect in Law. Upon which Act, divers doubts and ambiguities were conceived, ſome whereof were of greater difficulty then others: And firſt, A Doubt was conceived, whether the ſaid Act of the 10 of H. 7. does extend to the Succeſſors of H. 7. for that the Act ſpeaks onely of the King generally, and not of his Succeſſors. 2. If the Queen Mary were within the Word King; and although theſe were not matters of great ambiguity, for that this word KING, which imports his politicke Capacity, which never dies, and being ſpoke indefinitely, does extend in Law to all his Succeſſors, yet is this ſo expounded by the ſaid Act of 3. and 4. Phil. and Mar. Viz. That the ſaid Act of the 10 of H. 7. ſhall extend to the Kings and Queens Majeſty, her Heirs and Succeſſors. Secondly, Where the Act of Poynings ſaies, The Kings Lievtenant and Councel there, a ſcruple did ariſe; that if the King appoint one by the name of his Deputy, or Lord Juſtice, or if he conſtitute two Lords Juſtices, chiefe Governor or Governors, and the Councel, &c. and therefore it is explained in the Act of the 2 and 3 Phil. and Mar. that the ſaid Act of Poynings extends to all of them. Thirdly, The greateſt and moſt difficult doubt was upon theſe words of the Act of Poynings: And ſuch Cauſes, Conſiderations, and acts affirmed by the King and his Councell to be good and expedient for that Land, &c. Whether the King may make any change or alteration of the Cauſes, conſiderations, or Acts which ſhall be tranſmitted hither from the Lievtenant and Councell of Ireland, for that it is not affirmative, but correction and alteration of them; and therefore it was neceſſary to explain, that the Act of the 3 and 4 Phil. and Mar. was in theſe words. Either for the paſſing of the ſaid acts, and in ſuch form and tenor as they ſhould be ſent into England, or elſe for the change or alteration of them, or any part of the ſame. Fourthly, Another Queſtion was upon the words of the firſt Act, Viz. That done, a Parliament to be had and holden, &c. If at the ſame Parliament other Acts, which have been affirmed or altered here, may be enacted by the Authority of the Parliament there,

The word *King* extends to his Succeſſors.

The word *King* extends to the word *Queen*.

there, the which is explained by the ſaid laſt Act in theſe words, Viz. For paſſing and agreeing upon ſuch Acts, and no others, as ſhall be ſo returned under the great Seale of England, Fiftly, Great doubt did ariſe on theſe Words, That done a Parliament to be holden, whether the Lievtenant and Councell of Ireland, after the Parliament begun, and Pendente Parliamento, may upon debate and conference had there, tranſmit any other conſiderations, Cauſes, Menes, Proviſions, and Ordinances, as ſhall ſeem to them to be good to be enacted at the ſaid Parliament within the Realm of Ireland, the which is explained by the ſaid 3 and 4 Phil. and Mar. by expreſſe words, that they may.

Note Reader, the Order of Proceedings and Summons of Parliament in Ireland; Firſt, the Lievtenant and Councell do certifie under the great Seale of Ireland the cauſes and conſiderations of all ſuch Acts, as ſeem good to them to be paſſed in Parliament, ſo that Originally it is to begin there. 2. They are to be affirmed, altered, or changed, and returned under the great Seal. 3. Licenſe under the great Seal to ſummon and hold a Parliament. 4. To be done *Pendente Parliamento*, as it appears ought to be.

And it was unanimouſly reſolved, that the Cauſes, conſiderations and Acts tranſmitted hither under the great Seal of Ireland, ought to be kept and preſerved here in the Chancery of England, and ſhall not be remanded. 2. If they be affirmed, they ought to be tranſcribed under the great Seal and returned into Ireland, and all that wich paſſes the great Seal, ought to be enrolled here in the Chancery. 3. If the Acts tranſmitted hither be in any part altered or changed here, the Act ſo altered and changed, ought forthwith to be returned under the great Seal of England; but the Tranſcript under the great Seal of Ireland, which remain in the Chancery here, ſhall not be amended, but the amendment ſhall be, under the great Seal of Eng as aforeſaid, returned into Ireland, without any ſignification or certification of their allowance by thoſe in Ireland; for as the Acts move Originally from Ireland, ſo the amendments or alterations move here in Eng. all the Bills which are tranſmitted here from Ireland, are with the petition of the Deputy and Councell of the King altogether under the great Seal of Ireland, and ſo all the Acts which are affirmed or altered, are returned together under the great Seal of Eng. See 10 H. 6. 8. which begins, Mich. 18 H. 6. Rot. 46 coram Rege, how the Par. in Ireland was holden there before Poynings Act. And ſee another act made at the Parl. in Ireland in the ſame year of 10 H. 7. c. 22. it is enacted, that all Statutes late made within this Realm of Eng. concerning or belonging to the common and publick-Weale of the ſame, from henceforth to be deemed good and effective in the Law, and over that, be accepted, uſed and executed within this Land of Ireland, in all points, at all times requiſite, according to the tenor and effect of the ſame: And over that, by the authority aforeſaid, that they and every of them be authoriſed, proved, and confirmed within the ſaid Realm of I. and if any ſtatute or ſtatutes have been made within this ſaid Land heretofore to the contrary, that they and every of them by the authority aforeſaid, be adnulled and revoked, void and of none effect in the Law. And obſerve, that this word (late) in this Act, hath the ſame ſence as (before) ſo that this Act extends to all Acts of Parliament made in Eng. before the Act of 10 H. 7. And that is the reaſon, that all Acts of Parl. made in Eng. before this Act concerning Ireland, but onely generall Acts made ſince the ſaid Act of 10 H. 7. do not bind them, becauſe that (as it hath been ſaid) they have a Parliament for the Realm of Ireland, and thoſe of Ireland do not come to our Parliament, vid. R. 3. 12. Hibernia habet Parliamenta & faciunt leges, & noſtra ſtatuta non ligant eos, quia non mittunt Milites ad Parliamentum, ſed perſonæ eorum ſunt Subjecti Regis, ſicut Inhabitantes Calinæ, Goſcogniæ & Guienæ.

But

Note. But queſtion is made of this in ſome of our Books, vid. 20 H. 6. 8. 32 H. 6. 25. 1 H. 7. 3. 8 H. 7. 10. 8 Rich. 2. proceſſe 204. 10 Ed. 5, 41. 13 Ed. 2 titulo baſtard, 11 H 4. 7. 7 E. 4. 27. Plowdens Comment. 368. 13 Eliz. Dyer 35. 2 Eliz: Note. Dyer 366. Calvins Caſe in the ſeventh part o my Reports 226. 14 Ed. 3. 184. A Prebend in England is made Biſhop of Dublin in Ireland, his Prebendary is void.

Where a Statute in *England* is of force in *Ireland*. See the Statute of Ireland, upon what Books and Acts of Parliament; this queſtion is now by common experience and opinion without any ſcruple reſolved, That the Acts of Parliament made in England ſince the Act of the 10 H. 7. do not bind them in Ireland; but all Acts made in England before the 10 H. 7. by the ſaid Act made in Ireland An: 10 H. 7. cap. 22. do bind them in Ireland.

Dignity. Prerogative. NOte, that Camden King at Armes told me, that ſome held that if a Baron dies, having iſſue divers Daughters, the King may confer the Dignity to him who marries any of them, as hath been done in divers caſes, Viz. In the caſe of the Lord Cromwell, who had iſſue divers Daughters, and the King did confer the Dignity upon Burchier who married the yongeſt Daughter, and he was called Lord Cromwell: And ſo in other caſes: And he ſaid, that the Earle of Gloceſter, who had married the Daughter of King Henry the third, and the Counteſſe after Married Mount Hermer, who was her Husbands Secretary, for which the King Impriſoned him; and, after being reſtored to the Kings Favour, during the minority of the Son of the ſaid Earle of Gloceſter, and untill the Infant came of full age, and when the Infant was of full Age, he was called to the Parliament by the name of the Earl of Gloceſter, and the other by the name of Mount Hermer Knight; and he ſaid, that it appears in the Edict, or Statute made in France, that if any be made Duke, Marqueſſe, Earle, or Baron of any priviledged place, as of Guiſe, &c. if he dye without Heire Male of his body; the Dignity is not only extinct, but the King ſhall have the Manor or Territory whereof he took his name and Dignity: Sed nos non habemus talem conſuetudinem.

Eccleſiaſticall juriſdiction. NOte (by Linwood) that it appears that by the Canons Eccleſiaſticke, none may exerciſe Eccleſiaſtical Juriſdiction, unleſſe he be within the Orders of the Church, becauſe none may pronounce excommunication, but a ſpirituall perſon; And there it appears, that as well the Regiſter as the Judge ought to be Spirituall, but now by the Statute of the 37 H. 8. cap. 17. A Doctor of Law or Regiſter, although he be a Lay-man, may execute Eccleſiaſtical Juriſdiction.

Note alſo, that by the Canons no Eccleſiaſticall Judge ought to cite any Church-warden to the Court, but ſo as he may return home again to his houſe the ſame day.

Alſo the Canons do limit how many Courts Ex Officio they may have within a year.

Mich. 11 Jac.

NOte, that if a man give to one of his Children a certain ſumm in his life, and after dies, although this is not given as a childs full Portion, yet it ſhall be ſufficient for him: but if the Father by writing, or by Will does declare, that it is but part of a Childs Portion, then he ſhall have a full Childs part, otherwiſe not. But ſome made a difference where this ſumm ſo given, and declared to be put for part, ſhall be accounted upon account parcel of the intire Eſtate, or not; that is to ſay, if the Iſſue ſo in part advanced, ſhall have ſo much as amounts to a Childs part, and that the Wife and the Executor ſhall gain therby, where that this Portion ſo given, ſhall be of no benefit to the Wife or the Executors. Cuſtome of London.

As if a man hath two Children, and gives to one of them a hundred pound in part of his advancement, and then dies worth 900 l. in this caſe the Wife, the Iſſue not advanced, and the Executors ſhall have but three equal parts of the 900 l. Viz. three hundred pound a peece; and then this hundred pound ſo given ſhall be in Hotchpot between the Children: which (as I think) cannot be; for then there ſhall not be equality among the Iſſues, as the Cuſtom doth require, who ought in my opinion to have the precedency of favour, if any be.

Note, it was holden by the Judges in the Kings Bench, That if a man be poſſeſſed of a houſe and term for years, doth deviſe for years, does demiſe this to his Wife for life, the remainder over, and dies, all his Debts being paid; If the Widow enters generally, and converts the profits to her owne uſe, and not to pious Works; this is a determination of her Election: And this is the generall caſe, and therfore it is good that it be ſpecially found. Deviſe.

Haynes Caſe.

NOte, in the Lenten Aſſiſe holden at Leiceſter 11, and 12 Jac. the caſe was, That one William Haynes had digged up the ſeverall Graves of three men and one Woman in the night, and had taken their winding Sheets from their bodies, and buried them again: and it was reſolved by the Juſtices at Serjeants Inne in Fleetſtreet, that the property of the Sheets remain the Owners, that is, in him who had property therein, when the dead body was wrapped therewith, for the dead body is not capable of it, as in 11 H. 4. If Apparel be put upon a Boy, this is a Gift in the Law, for the boy hath capacity to take it; but a dead body being but a lump of earth, hath no capacity: alſo it is no Gift to the perſon, but beſtowed on the body, for the reverence towards it, to expreſſe the hope of Reſurrection. Alſo a man cannot relinquiſh the property he hath to his Goods, unleſſe they be veſted in another; and accordingly at the ſaid Aſſiſes, he was ſeverally indicted for taking of each of theſe Sheets: And the firſt Indictment was of petty Larceny, for which he was whipped: And at the ſame Aſſiſes he was alſo indicted for the Felonious taking the three other ſheets, for which he had his Clergy, and ſo eſcaped the ſentence of death, which he well deſerved, for this inhumane and barbarous Felony. Felony to ſteal a Winding ſheet. Who hath propriety in them.

Hil. 11 Jacobi.

Earl of Derbies Case.

County Palatine.

IN the Chancery, between Sir John Egerton Plaintiff, and William Earl of Derby, Chamberlain of Chester and others, Defendants, for the trust and interest of a Farm called Budshaw in the County of Chester: It was resolved by the Lord Chancellor, the chief Justice of England, the Master of the Rols, Doderidge, and Winch Justices.

1. That the Chamberlain of Chester, being sole Judge of Equity, cannot decree any thing wherin himself is party, for he cannot be a Judge in propria causa: but in such case where he is party, the Suit shall be heard here in the Chancery, Coram Domino Rege.

2. If the Defendants dwell out of the County Palatine, he who hath cause to complain in equity, may also complain here in the Chancery, for in respect that proceedings in Chancery do bind the person only, if the person be out of the Jurisdiction, the Chamberlain of Chester cannot relieve the party; and therfore, Ne curia Domini Regis deficeret in justitia exhibenda, the Suit shall be here in the Chancery; for else the Subject shall have good right, and yet have no remedy, which will be inconvenient.

And this does persue the reason of the common Law, as appears 13 Ed. 4. tit. Jurisdiction. 8 Ed: 2. Ass 382. 5 Ed: 3. 30. 30 H. 6. 6. 7 H. 6. 37. The Case of the Lord of the Marches of Wales, although an Action will lye in Wales, yet because he which hath cause of Action cannot have Justice there, he shall sue here in the Kings Bench; for where the particular Courts cannot do Justice to the parties, they shall sue in the Kings generall Court at Westminster, 11 H: 4. 27. 8. Ed: 4 8. in all cases where it appears to the Court, that those who have liberties to take Conizans, do fail of right, as in matter of foraign plea, &c. the matter shall be determined in the generall Courts at Westminster.

Note. Causes in equity may not be determined by Commissions.

3. It was resolved, that the King cannot grant a Commission to determine any matter of equity, but it ought to be determined in the Court of Chancery, which hath had Jurisdiction in such case time out of mind, and had alwaies such allowance by the Law: But such Commissions or new Courts of equity shall never have such allowance, but have been resolved to be against Law, as it was agreed in Potts case,

4. Upon consideration had of the Certificate of the Lord Dyer and other Justices in the time of Queen Elizabeth, concerning the Jurisdiction of the County Palatine of Chester; it was resolved, that for things transitory, although that in truth they be within the County Palatine, the Plaintiff may by Law alledge them to be done in any place within England, and the Defendant may not plead to the Jurisdiction of the Court, that they were done within the County Palatine: See Dyer 13 Eliz: fol: 302. 716 Office found by Mandate out of Chancery of Land in Cheshire is void.

Forms

Forms and Orders of Parliament.

IN the House of Commons, when the Speaker is chosen, he in his place where he first shall sit down, shall disable himself, and shall pray that they would proceed to a new Election: but after he is put into the Chair, then he shall pray them, that with their favours he may disable himself to the King, so that their expectations may not be deceived. Proceedings in Parliament

But note, that the King the first day of Parliament shall sit in the upper house of Parliament, and there the King or the Lord Chancellor by his commandment, shall relate and shew the causes of calling the Parliament, the which are best founded on the words of the Writ of Summons of Parliament (which is a good Subject to treat on, &c.) and then in the conclusion of the Oration, the Commons are commanded to chuse a grand and learned man to be their Speaker. Upon which the Commons shall presently assemble themselves in the lower house, and he is to be a Member of their Parliament, and hereupon he shall disable himself, ut supra.

And two or three daies after, the Commons shall present their Speaker in the upper house to the King, where he shall disable himself again to the King, and in most humble manner shall intreat the King to command them to chuse a more sufficient man: And after he is allowed by the King, then he shall make an Oration, and in the conclusion shall pray the four usuall Petitions; the which Oration being answered by the Lord Chancellor, and his Petitions allowed, the Speaker and the Commons shall depart to the house of Commons, where the Speaker in the Chair shall request the Commons, that inasmuch as they have chosen him for their mouth, that they would assist him, and favourably accept his proceedings, which do proceed out of an unfaigned and sincere heart to do them Service.

Note, in the lower house, when a Bill is read, the Speaker does open the the parts of the Bill, so that each Member of the house may understand the intention of each part of the Bill; and the like is done by the Lord Chancellor in the upper house; then when it is read the second time, somtimes it is ingrossed without any Commitment, but then the Speaker makes question of it in this manner: The question is, Whether this Bill shall be engrossed, or not. As many as would have the Bill ingrossed, shall say, Yea; and as many as would not, say, No.

But in the upper house of Parliament when such question is made about engrossing, if there be no contradiction, the Lords do not deliver their assent in saying, Content, or their dissent in saying, Not content, for husbanding the time: but if their be any on tradiction, it is tried Seriatim, by Content, or not content; but neither in the upper or lower house, the Lord Chancellor or Speaker, shall not repeat a Bill or an amendment but once.

When a Bill is commited to the second reading, then if the Commitees amend it in any point, then they shall write down their amendments in a paper, and shall direct to a line, and between what words the amendments shall be put in, or what words shall be interlined, and then all shall be ingrossed in a Bill.

And if a Bill passe in the Commons house, and the Lords amend the Bill when it is sent to the upper house, they do as before shew the line, and between what words, and after the amendments are ingrossed with particular

ticular references, and the Bill with the amendments are ſent again to the houſe of Commons where they affirme them: the amendments are read three times, and then they inſert them into the body of the Bill, and ſo E converſo of a Bill which paſſeth firſt in the upper houſe. But note, that in one of theſe caſes the intire Bill ſhall not be read again in the houſe wherin they firſt paſſe but the amendments only, for no Bill ſhall be read above three times.

No Lord ought to ſpeak to the Bill two times in one day. Alſo no Knight, Citizen, or Burgeſſe ought to ſpeak above once to one Bill in one day, unleſſe ſometimes by way of explication.

No private Bill ought to be read before the publick Bills, unleſſe the one houſe or the other do require it.

Note, in the houſe of Commons, thoſe that are for the new Bill (if there be a queſtion of voices) ſhall go out of the houſe, and thoſe who are againſt the Bill, and for the Common Law or any former Law, ſhall ſit ſtill in the houſe; for they are in poſſeſſion of the old Law: And in the upper houſe two Lords are appointed, one of the one part, the other of the other to number the voices.

In both houſes, he which firſt ſtands up to ſpeak, he ſhall firſt ſpeak: without any difference of perſons.

When a Bill is ingroſſed at the third reading, it may be amended in the ſame houſe in any matter of ſubſtance, à fortiori; the erras of the Clerk in the ingroſſing may be amended, &c.

Paſch. 12. Jac.

Walter Chutes Caſe.

New erected Office void,

WAlter Chute Sewer to the King, did exhibite a Petition to the King, that for the ſafety of the Realm, and the ſecurity of ſtrangers within the Realm, that the King would vouchſafe to erect a new Office of Regiſtring of all ſtrangers within the Realm, except Merchant-ſtrangers, to be kept at London, and to grant the ſaid Office to the Petitioner, with a reaſonable Fee, or without a Fee, : And that all ſtrangers, except Merchant-ſtrangers, might depart the Realm within a certain convenient time, if they do not repair to the ſaid Regiſter, and take a Billet under the Regiſters hand: Which Petition the Lords of the Councell did refer to me, by their honourable Letters of the 13. of Novem. 1613, that I calling to me Counſel learned in the Law, ſhould conſider what the Law is in that behalf, and how it may ſtand with convenience and policy of State, to put the ſame in execution, and by whom it ought to be performed: And upon conference had with the Juſtices of the Common Pleas, and the other Juſtices and Barons of Serjeants Inne in Fleetſtreet; It was reſolved, that the erection of ſuch new Offices, for the benefit of a private man was againſt all Law, of what nature ſoever: And therfore where one Captain Lee did make ſuit to the King to have a new Office to make Inventory of Goods of thoſe who died teſtate or inteſtate; It was reſolved by the Lord Chancellor and my ſelf, that ſuch Grant ſhall be utterly void, although no certain perſon hath it, and that this was againſt Common Law, and the Statute of 21 H. 8. In like manner another ſued to

to have the Regiſtring of Birth-dayes, and the time of the death of each perſon within the Realm, and that it might be on Record and authenticall: So Mich. 19 Jac. To make a new Office in the upper Bench, for the onely making of all Latitats at the Suit of the Lord D'aubigny, and after him of the Lord John Hungerford, and others, was reſolved to be void. So Littletons ſuit, to name an Officer to be a generall Regiſter, or rather Tabler, or Inderer of all Judgments, for Debts, and Dammages, Recognizances, Bills, Obligations to the King, Deeds inrolled, Fines upon Offenders in the Star Chamber, and other Courts whatſoever: and this was pretended to be for the benefit of the Purchaſer, and the ready finding of Records; and to ſuch purpoſe was made the Statute of the 27 Eliz. for inrolling of Statutes; but the Suit was rejected by the two chief Juſtices and others: for every Court ſhall chooſe Officers either by Law or Preſcription: the Law or Cuſtom may not be changed without a Parliament, and ſo it was reſolved Hil. 12 Jac. Regis; and divers other ſuch inventions were reſolved to be againſt Law and Record.

As to the ſecond, in the caſe of Sir Walter Chute, concerning the conveniency or inconveniency of it, it was reſolved, that it was inconvenient for divers cauſes. 1. For a private man to have private ends. 2. The numbring of ſtrangers by a private man would infer a Terror, and the King and Princes of other Countries will take offence at it, and will do the like to the Kings Subjects. 3. It is to be conſidered, what breach it will be to former Treaties.

As to the third, in the caſe of Sir Walter Chute, that may be performed without any inconvenience; and ſo it was deviſed by the Lord Burleigh, and other Lords of the Councel: An. 37 Eliz. viz. To write Letters to the Majors, Bayliffs, or other head Officers of every City, Borough, or Town where any ſtrangers are reſident, to certifie how many ſtrangers, and of what quality are in their Citties, &c. the which they are to know in reſpect of their Inhabitants, and Contributions to the poor, and other charges, and this may be done without any writing.

Which Suit being made to the Lords, was well approved by them, and the Suit utterly diſallowed the 3. Dec. An. 3 H. 8. Commiſſion granted to divers, to certifie the number of Strangers, Artificers, with the number of their Servants within London, and the Suburbs thereof, &c. according to the Statutes: See Candiſh Caſe, 29 Eliz. for making of all Writs of Superſedeas in the Kings Bench.

13 Eliz. A grant of an Office to Thomas Knivet, to examine all his Majeſties Auditors and Clerks of the Pipe concerning their Offices for years: It was reſolved by the Court to be againſt Law, for it belongs to the Barons who are Judges: And it is alſo an Innovation in a Court of Juſtice. 25 Eliz. A Grant of an Office to Thomas Leichfield to examine all deceits, falſe allowances of the Queens Officers for eight years, reſolved to be void.

The making of Subpœna's in Chancery, anciently belonged to the ſix Clerks: The late Queens Majeſty granted the ſame by Patent to one particular man.

The keeping and filing of Affidavits in Chancery, anciently belonged to the Regiſter. The Kings Majeſty that now is, granted the ſame to one particular man.

The erecting and putting down of Inns hath been anciently in the power of the Juſtice of Peace. His Majeſty hath given that power by Patent to a particular man.

The taking of the Depoſitions, and all other proceedings before and by the Commiſſion which hath uſed to be taken and kept by the Commiſſioners themſelves, or ſome Clerk of their appointment; his Majeſty hath granted the ſame by Patent to one particular man.

The King by his Letters Patents granted to Simon Darlington the Office of Alneger, and limited what Fees he ſhould take.

The ſole drawing, writing, and ingroſſing of all Licenſes and Pardons was granted to Edward Bacon Gent. with the Fee that had formerly been taken, and a reſtraint for all others, &c.

The Offices of Subpœnas was granted to Thomas George and others during life, with the Fee of 2s. and a reſtraint that no others preſume to make thoſe Writs.

The Office of making and regiſtring all manner of aſſurances and Policies, &c. was by Letters Patents granted to Richard Gandler Gent. with ſuch Fees as the Lord Major and others ſhould rate, with power to rate Fees, and a reſtraint of all others, &c. which was during pleaſure, and afterwards to him and others during lives.

The Office of writing Tallies and Counter-Tallies granted to Sir Vincent Skinner.

Quare. The Office of ingroſſing Patents to the great Seal, and an encreaſe of Fees granted late to Sir Richard Young, and Mr. Pye.

Sir Stephen Procters Caſe.

Judges divided in the Star-chamber.

IN an Information preferred in the Star-chamber by the Attorney-generall, againſt Stephen Procter, Berkenhead, and others, for Scandall and Conſpiracy of the Earl of Northampton, and the Lord VVooton. At the hearing of this caſe, were preſent eight Lords, Scil. the chiefe Baron, the two chief Juſtices, two Biſhops, one Baron, the Chancellor of the Exchequer, and the Lord Chancellor: And the three chief Juſtices, and the Temporal Barons condemned Sir Stephen Procter, and fined and Impriſoned him: But the Lord Chancellor, the two Biſhops, and the Chancellor of the Exchequer acquitted him. And the Queſtion was, if Sir Stephen Procter ſhall be condemned or acquitted; and it ſeemed to ſome of the Clerks Prima facie; that the better ſhall be taken for the King, and that he ſhall be condemned. But others were of the contrary Opinion; and thereupon the matter was referred to the two chiefe Juſtices, calling to their aſſiſtance the Kings Learned Councell: And firſt they reſolved, that this Queſtion muſt be determined by the Preſidents of the Court of Star-chamber, for that Court is againſt the Rule and Order of all other Courts, for in the Kings Bench, the common Pleas, or the Exchequer, or in the Exchequer chamber, where all the Juſtices are aſſembled, if the Juſtices are equally divided, no Judgment can be given. And ſo it is in the Court of Parliament; and therefore this courſe ought to be warranted by the cuſtome of the Court: And as to that two Preſidents only were produced for the maintenance of the ſaid Cuſtome, Viz. One in the Hilary Term. 39 Eliz. betweene Gibſon Plaintiff, and Griffith and others Defendants: where the complaint was for a Riot, and at the hearing of the caſe, there was eight preſent, four gave their Judgments that the Defendants were guilty; but the other four, whereof the Lord Chancellor was one, pronounced

red the Defendants not guilty, and no ſentence of condemnation was ever entred, becauſe the Lord Chancellor was one of the four who acquitted them. The other was Hill. 45 Eliz. In an information by the Attorney-generall againſt Katherine and others, for forging of a Will, and a Miſdemeanour for procuring a fraudulent Deed to defeate the Queen of her Eſcheat: And eight were in preſence at the hearing of the cauſe, whereof four found the Defendants guilty of Forgery, and did inflict the puniſhment according to the Statute of the 5 Eliz. but the others, whereof the Lord Chancellor was one, gave ſentence; that the Defendants were guilty of the Miſdemeanour, and not of the Forgery, and impoſed a Fine of 500l. only: which decree was entred according to the Lord Chancellor's voice, although the ſentence on the other ſide was more beneficiall for the King, and no other preſident could be found in this caſe, the which I have reported this Term.

NOte the Exaction under the good Name of Benevolence, began in this manner. Concerning Benevolence.

When King Edward the fourth, had a Subſidy granted to him in the 12 Edw. 4. by Parliament, becauſe he could have no more by Parliament, and without a Parliament he could not have any Subſidy to be levied of the Lands and Goods of the Subject, he invented this ſhift or deviſe, in which three things are to be obſerved.

1. The Cauſe.
2. The Invention.
3. The Succeſſe.

1. The Duke of Burgundy, who had Married Margaret, the Siſter of Edw. 4. ſolicited King Edward to joyn in War with him againſt the French King, to which the King eaſily conſented, becauſe he ſought revenge againſt the French King for aiding the Earle of Warwick, Queen Margaret, and Prince Edward, and their party; and therefore, to make War againſt the French King, was the cauſe. Hollingſhead 11 Ed. 4. 694. Stow. 701.

2. The Invention was, The King called before him at ſeverall times a great number of the Wealthieſt of his Subjects, to declare to them his neceſſity, and his purpoſe to levy War for the honour and ſafety of the Kingdome, and demanded of each of them a certain Summe of Money, and the King treated with them, with ſuch great grace and clemency, and with ſuch gentle prayer to aſſiſt him in his neceſſity, for the Honour of the Realm, that they very freely yielded to his requeſt, for the Honour and ſafety of the Realm: amongſt the reſt, there was a Widow of a very good Eſtate, of whom the King meerely asked what ſhe would willingly give him for the maintenance of his Wars; By my faith, quoth ſhe, for your lovely countenance ſake, you ſhall have twenty Pound, which was more then the King expected; the King thanked her, and vouchſafed to kiſſe her, upon which ſhe preſently ſwore, he ſhould have twenty pound more.

3. The ſucceſs and event was; That whereas the King called this a Benevolence to pleaſe the people, yet many of the people did much grudge at it, and called it a Malevolence.

Primo. Ed. 5. in the Oration of the Duke of Buckingham in Guild Hall in London, he inveighed, amongſt other things, againſt this Taxation under the Name of Benevolence. 1 Rich. 3. cap. 2. the Subjects of the Realm ſhall not be charged with ſuch charge or impoſition called Benevolence, which leadeth to the ſubverſion of the Law, and deſtruction of Commonalty, as appears in the Preamble (where any ſuch charge.) And that ſuch exaction before taken, under the name of Benevolence, ſhall not be drawn into example

ample to make such or the like charge, but shall be damned and annulled for ever: But it appears by the Preamble, that this was against the will and liberty of the Subject, but free-will offering is not restrained.

An. 6 H. 7. The King declared in Parliament, that he had just cause of Warre against the French King, which for the causes there shewn was approved, and for that he desired a Benevolence towards the maintenance of it; and every one promised his helping hand, the which the King greatly commended; and to the intent that the poorer sort might be spared, he demanded it by way of a Benevolence, according to the Example of Edw. 4. and published, that he would by their open hands measure their benevolent hearts; and he who gives but a little, according to his gift.

By this means he collected great Summes of Money, with some grudge for the extremity shewn by the Commissioners, 11 H. 7. cap. 20. An Act was made for levying of that Benevolence, according to their assent, but onely of such as assented.

An. 20 H. 7. A commission to levy what was granted by 11 H. 7.

Stow. 880. Note, that 15 H. 8. a Commission under the great Seal, called a Commission of Anticipation, to collect the Subsidy before the day.

An. 16 H. 8. For War with France, a Benevolence levied by Commission with great Curses, and Imprecations against the Counsil, and with Success, for it was to levy a sixth part of the value in Money or Plate against the good will of the Subject.

An. 26 H. 8. Another Benevolence levied by Commission for maintenance of War against France, with ill successe, for it was exacted of the Subject against his good will. But if the Subjects of their free-will, without any compulsion, will give to the King for publick uses any Summs of Money, this is not prohibited by any Statute.

And the Statute 11 H. 7. cap. 18. proves this, where the Parliament compels them who have freely granted any thing to the King for publick use, to pay it.

Feb. An. 40 Eliz. It was resolved by all the Justices and Barons, that a free Grant to the Queen without coercion is lawful, and accordingly they granted to the Queen, Quod nota bene, quia, &c.

Pasch. 12. Jac. Regis.

The Case of Dungannon in Ireland; The case of the new Corporation of Dungannon in Ireland, was in effect, Scil. That the King constituted the Town of Dungannon to be a free Borough, Et ulterius volumus, declaramus, & statuimus, quod inhabitantes villæ prædictæ sint unum corpus corporatum per nomen Præpositi 12. Burgentium & Communitatis Dungannon, & per idem nomen placitare possint: Et quod ipsi prædicti Præpositi & Burgenses & successores sui habeant potestatem eligendi duos Burgenses, &c. ad Parliamentum, &c. And the doubt was, whether this Grant, of Election of Burgesses of Parliament was good, for because it was granted but to parcel of the Body, scil. To the Provost and Burgesses, and not to the Provost, Burgesses, and Commonalty; And the chiefe Baron thought, that forasmuch as this was not but a nomination or election, it was sufficient to make the Provost and Burgesses only to have it: And he took a diversity betwixt nomination and other inheritance: But this was

denied

denied by all the Juſtices and Barons, for this power to elect Burgeues, is an Inheritance of which the Prouoſt and Burgeſſes are not capable, for that it ought to be veſted in the entire Corporation, Scil. Prouoſt, Burgeſſes, and Commonalty: And it ſeemed to Hubbard, chief Juſtice of the Common Pleas, that the King may grant to the Inhabitants of Iſlington to be a free Borough; and that the Burgeſſes of the ſame Town may elect two Burgeſſes to Parliament: And that it ſhall be good, although that the Burgeſſes be not incorporated; for there are many Burgeſſes who elect Burgeſſes to the Parliament, which are not incorporate: But it was reſolved by all, that ſuch a grant made by the King ſhould be void; for the Inhabitants have not capacity to take an Inheritance, as in the 15 Ed. 4. to have common: And Littleton ſaith in his Chap. of Burgage, that the Boroughs which ſend Burgeſſes to Parliament, were the moſt ancient and principal Cities, &c. So that it ſhall be intended, that at the firſt they were incorporate. Alſo, Plus valet ſæpenumero vulgaris conſuetudo, quàm Regalis conceſſio.

But it was reſolved by Hubbard, Tanfield, Altham, VVinch, Nicols, and Haughton, Quod volumus, was a good word of Grant, as Pigot was of Opinion, 21 Edw. 4. And this ſhall be an implyed Grant to all the Corporation, that the Prouoſt and Burgeſſes ſhall elect, &c. And regularly, when the Grant is indefinite, Scil. Firſt, Concedimus an incertain thing, Et ulterius quod Præpoſitus, & Burgenſes, & Succeſſores ſui elegerint, this ſhal be within the firſt Concedimus to all the Body, which that party ſhall chooſe: But the chief Juſtice of England, and Doderidge thought the contrary, for in this caſe there was but an Ordinance to erect the Corporation; and no grant altogether to any perſon, ſo that this clauſe, Et quod, &c. is idle and vain.

And Note, all the new Corporations were of the ſame forme, and in none of them is any clauſe to elect new Burgeſſes, ſo that when thoſe of the modern Burgeſſes dye, this power to elect Burgeſſes is gone.

Mich. 12. Jac. Regis.

A Queſtion was moved to the chiefe Baron, and the Juſtices of Serjeants Inne in Chancery Lane; That if a Felon be convict either by verdict or confeſſion, If immediatly by his Conviction, his Goods and Chattels be forfeited: And it was ſaid, that if the Felon after his conviction pray his Clergy, that then cleerely he ſhall forfeite his Goods and Chattels, for Quodammodo this is a flight, becauſe he refuſeth to be adjudged by the common Law, and flies to the priviledge of the holy Church. But it was reſolved by the chief Baron and the Juſtices, that immediately by his conviction his Goods and Chattels are forfeited; and the praying of his Clergy is not any forfeiture, for then in caſe where he cannot have his Clergy, he forfeits nothing untill his Attainder, which none will affirme. And with this agrees Stamford. fol. 192. a. where he ſaies, that the Goods of a Felon are forfeited, which he hath the day of the verdict given; and this is proved alſo by the Statute of 1 R. 3. where it is admitted, that the Goods of a Felon convict are forfeited and may be ſeiſed. And of the ſame Opinion was the chief Juſtice, and the Juſtices of Serjeants in Fleet-ſtreet, vid. Trin. 41 Eliz. 332.

Mich. 12. Jac. Regis.

Anne Hungates Caſe in Cam. ſtell.

IN this very Terme a great Caſe was heard and determined in the Star-Chamber, betweene Sir Henry Day, who dyed, pendent the Bill, and Anne his Wife, and Nicolas Bedingfield Eſquire, and Elizabeth his Wife, Plaintiffs: And Anne Hungate Widow, Sir Robert Wind, Henry Branthwait Eſquire, Thomas Townſend Eſquire, Thomas Blomfield Gent. and George Min Gent. Defendants, and the caſe in effect was; That Henry Hogan Eſquire, being ſeiſed of the Mannor of Hamonds, and of divers Lands of Eaſt Bradenham, &c. in the County of Norfolke in Fee, by Deed made a Feoffment of them to the Uſe of the ſaid Anne who took Hungate to Husband, and She had Iſſue by him a Son and a Daughter, and he Dyed: And Anne obtained a Grant of the Wardſhip of the Son, and after when the Son was of the age of one and twenty years, ſaving ſix weeks; By Dedimus poteſtatem, directed to Sir Robert Wind, Henry Branthwait then Feodary, and Thomas Townſend, they tooke Cognizance of a Fine of the ſaid Son, being then of the age aforeſaid, and ſicke: And the Bill charged them all with practiſe in procuring the ſaid Son to acknowledge the Fine; they all knowing that the ſaid Son was within age, and in Ward of the King in Cuſtody of the ſaid Anne: But there was not any practiſe or circumvention uſed by any of the Defendants to procure the ſaid Son to acknowledge the ſame, but the Son of his owne good will levied it. And by Indenture the uſe was limited to his Mother, the ſaid Anne and her Heirs, with power of revocation by the Son upon tender of ten ſhillings, &c. and this was in conſideration, that the mother had paid the Debts of his Father to a very great value, and had obtained the Wardſhip of him, and that her Joynture ſhould be confirmed; And that his Mother, if ſhe pleaſed, might give it to his Brother which ſhe had by Hungate, who was of half blood; and it appeared that the Mother knew the Son to be within age, but the Commiſſioners, for any thing that was proved, were ignorant of it, nor did they ſend for the Book of the Church, in which his age appeared being in the ſame Pariſh.

And the Councell for the Plaintiff prayed, that the Defendants ſhould be puniſhed for their miſdemeanor; and that the ſaid Women being Plaintiffs, who were Coſins, &c. Heirs to the ſaid Son, of the entire Blood, who ſhould be diſinherited by the ſaid Fine. To which it was reſolved by the two chief Juſtices, and the chiefe Baron, that there was not any crime puniſhable by the Law in this caſe: For the Judges of Law, and of this Court may puniſh ſuch Offences, and Crimes as are determinable in this Court: But the Judges cannot create Offences, nor do as Hannibal did, to make his way over the Alpes, when he could find none, for Judicandum enim legibus; et ubi non eſt lex, nec eſt tranſgreſſio: And for this, when the Infant levied the Fine, if it be not reverſed during his minority, the Fine is unavoidable in Law, and the Heirs of the Infant have not any remedy by the Law to reverſe it, the cauſe is for this, that the act of the Infant is not to be tried but by inſpection of his perſon: Non teſtium teſtimonio, non juratorum veredicto, ſed judicis in ſpectione ſolummodo: But the Judges as by adjuncula, may inform themſelves by Witneſſes, Church

Church Books, &c. And the reason of it, is, that the Fine should otherwise as well lose its effects as its name, for Dicitur finis ab effectu, quia finem litibus imponit: And if Infancy should be tryed otherwise then by inspection, no man should be sure of his Inheritance; for after the death of the Cognizor, averment may be made many years after; That the Cognizor was within age at the time of the Fine; and so many records avoided by naked averment, which should be against Law, and the cause of great vexation and suit, and Fitz. N. B. fol. 21. If an Infant levy Fine, he shall have a Writ of Error during his non-age, and assign it for Error; and this is Error of the Court in Law, and shall be tried by the Judges of Law.

And for this it was resolved by the said Justices, That forasmuch as no corruption and circumvention was proved in the Commissioners, or in any of the parties, of which they may be indicted at the Suit of the King, or punished in this Court, but the Fine shall stand.

And it was not apparant to the Commissioners, that he was within age, forasmuch as he wanted but six weeks of his full age, but if the Commissioners had knowledge that he was within Age, then this had been misdemeanor in them: For it was said, that Fines and Recoveries are like to the Pole Artique and Antartique, for upon those assurances of lives depends: for which by naked averment they cannot be shaken or impeached, for which divers notable Presidents have been concerning the matter in Question in this Court.

And for this in this Court, Mich. 24, and 25 Eliz. 14. between William Cavendish and Anne his Wife, one of the Co-heirs of Henry Knighrley, against Robert Worsley, and Katharine Lanter Co-heir, and Trafford, and other Defendants. And the case was; That Robert Worsley and Katharine his Wife being within age acknowledged a note of a Fine before Trafford, and another of the Defendants, by Vedimus Potestatem: And the Decree said, that the Commissioners did perfectly know that the said Katharine was within age; And for this cause every one of them was fined, but the Fine stands.

Mich. 38, and 39 Eliz. In this Court one Alexander Gilderbrand being seised of certain Lands in Windham, in Com. Norf. in Fee, one Hubbard procured one Roger who was in his Custody in his House, to take upon him the Name of Alexander Gilderbrand who was then beyond the Seas, to acknowledge a Fine to the said Hubbard of the said Lands, and they were fined in this Court; And it was part of the Sentence, that if he did not re-assure the Land to the said Alexander, he should forfeite a greater Fine to the Queen: But there was no Sentence to draw the Fine off from the File, nor Damages awarded to the said Alexander, who was the party grieved.

Mic. 12. Jac. Regis.

Mansfields Case.

AN. 23 Eliz. In the Court of Wards, the case was this; That Henry Bushley seised in Fee of certain Lands in North Mims in the County of Hertford, by his Will in writing demised the said Lands to Henry Bushley his Son in taile, the remainder to one William Bushley.

And

And for this, that his Son was within age, he demiſed the Education of him to Thomas Harriſon, whom he made his Executor: And afterwards it hapned, that Henry the Son became a monſtrous and deformed Cripple, and proved an Idiot, à nativitate; The which Idiot by the practice of one Nicols and others, was raviſhed and taken out of the cuſtody of his Guardian, and was carried upon mens ſhoulders to a place unknown, and there kept in ſecret, untill he had acknowledged a Fine of his Lands to one Bothome, before Juſtice Southcot. An. 9. Reg. Eliz. and by Indenture betwixt them, the uſe of the ſaid Fine was declared to the uſe of the Cognizée and his Heirs, which Bothome, An. 12 Eliz. conveyed the ſaid Land to one Henry Mansfield: And An. 22. Eliz. the ſaid Henry Buſhley the Son, by inquiſition was found an Idiot à nativitate; and upon this in An. 33. the Court of Wards toke Order for the Poſſeſſion of the ſaid Lands, Vide Calvers caſe in my Reports.

And it was moved as a doubt in the ſaid Court of Wards, whether the ſaid Fine ſhould be to the uſe of the ſaid Idiot and his Heirs; for notwithſtanding that the Fine which is of Record binds the Idiot for the cauſes aforeſaid, yet the Indentures are not ſufficient to direct the uſes: But it was reſolved, that foraſmuch as he was enabled by the Fine as to the Principal, he ſhall not be diſabled to limit the uſes which are but as acceſſory.

And the ſame is the Law of an Infant and Feme covert. And the ſaid Mansfield brought an Action of Treſpaſſe in the common Pleas againſt one Trott, the Farmer of the ſaid Lands; and the Iſſue was to be tried at the Barre: And the ſaid deformed Idiot was ſent out of the Court of Wards, to be ſhewn to the Judges of the common Pleas, and to the Jurors there tried and ſworn; And being brought upon a mans ſhoulders, the Judges hearing that the Title of Mansfield was under the ſaid Fine levied by that Idiot: The Lord Dyer, and the Court by conſent of parties, cauſed a Juror to be withdrawn; And the Lord Dyer ſaid, that the Judge who took the Fine, was never worthy to take another; but notwithſtanding this, and although the monſtrous deformity and idiocy of Buſhley was apparant and viſible, yet the Fine ſtood good.

Mich. 12. Jac.

Warcombe and Carrels Caſe.

20 OCt 6. Eliz. in the Star Chamber, where were preſent Sir Nicolas Bacon Knight, Keeper of the great Seale, the Marqueſſe of Northampton, the Earl of VVeſtmerland, the Earl of Suſſex, the Earle of Leiceſter, Lord Clynton, high Admiral, Lord Strange, and Hunſden, Progers Knight, Controller of the Houſhold, Sir Francis Knols, Secretary, Sir William Peeters, Sir John Maſon, Sir Richard Sackvil, under-Treaſurer of the Exchequer, Sir Robert Carlin, Maſter of the Rolls, Sir James Dyer, Juſtice del Banc. The caſe was, That Edward Carrell, an Apprentice of the Laws, for a great Summe of Money bought the Wardſhip of Johan, Daughter and Heir of Waincomb, of the County of Hereford, and married her to Edward Carrell, his youngeſt Son: And after

ter Hill: An: 5 Eliz. the ſaid John fell ſick, and being of the age of nineteen years, and not having any iſſue, the ſaid Edward her Husband perſwaded her to acknowledge a fine of her Inheritance, by which ſhould be conveyed an Eſtate to the Husband & Wife in tail, the remainder to the right Heirs of the Wife: And Cognizans was taken by Dedimus poteſtatem directed to Sir Tho: Sanders one Cheſnell of Grayes-Inne before Eaſter, divers Judges being here who might have examined her: And on Friday in Eaſter week ſhe died, but and the Fine and l'argent du Roigne, was entered as of the laſt Tearm, Scil. The Tearm of St. Hilary four dayes before the death of the Wife.

And the Originall Writ of Covenant bore teſte 15 Jan. returnable craſtino Pur. and the Dedimus poteſtatem 18. die Jan. And James Warcomb Coſin and Heir of the ſaid Johan, complained by Bill againſt Edward Carrel for obtaining of the ſaid Fine by indirect practiſe; And therupon the ſentence of the Honourable Court enſued thus.

This day a right honourable preſence being aſſembled in this Court, the matter depending in the ſame, between James Warcomb Eſquire, Complainant, and Edward Carrell of London Gent. Defendant, as well for and concerning the validity of the fine levied by the ſaid Edward Carrell, and Johan his late Wife of certain Mannors, &c. of the Inheritance of the ſaid Johan, which Johan, as the Plaintiff doth alledge, was not of full age at the time of the Fine levied; as alſo for certain ſiniſter and undue means committed and done by the ſaid Edward Carrell, in the ſuing and getting out of the ſaid Fine, as is ſuppoſed and alledged by the ſaid Complainant, was by great and long deliberation heard and examined, with all the allegations and ſayings, that could be alledged and ſaid on both parts.

Upon hearing of which matter the ſaid Fine was by the whole opinion of the Court adjudged good, available, and effectuall in the Law.

And alſo no fault adjudged to be in the ſaid Edward Carrell, in the ſuing and getting out of the ſaid Fine, but that the ſame was duely and orderly ſued out, according to the due forme and order of the Lawes of this Realm. And all this is within the Rule, Facta tenent multa, quæ fieri prohibentur: And the Heir hath Damnum abſque injuria, for the Law doth not give him any remedy to reverſe it. And as Edward Carrell was not puniſhed, although that he knew that his Wife was within age; ſo the ſaid Hungare ſhall not be puniſhed, although that ſhe knew that her Son was within age; and that the rather, by reaſon of the ancient Verſe,

Leges communes ſi neſcit fœmina, miles,
Clericus, & Cultor, Judex ſibi parcet & ultor.

And by ſentence all were diſmiſſed, &c.

Amongſt the Records in the Treaſury, Et inter placita coram Domino Rege de termino Sancti Mich: An. 42 Ed: 3. Rot: 27.

Cornubia Helena, filia Hugonis Allot, brought an appeal of Robbery againſt Laurence Boskoſleake, Richard Cohorta: Jo: Gilmin, and Johan his Wife, and divers others; the Defendants plead, Not guilty, &c and were found not guilty of the Felony aforeſaid, Nec unquam ſe ſubtraxerunt, ideo prædictus Laurentius & omnes alij, &c. eunt inde quieti: Et prædicta Elena pro falſo appello ſuo committitur priſonæ in Cuſtodia Mareſcalli Ric. de Inworth, Mareſcalli, &c. Et ſu-

per hoc prædictus Laurentius & alij petunt juxta formam ſtatuti quod Juratores hoc inquirant quæ damna prædictus Laurentius & alij ſuſtinuerunt occaſione falſi appelli prædicti: Et ſi prædicta Helena ſit ſufficiens ad damna ſolvenda: Et ſuper hoc quæſitum eſt à præfatis Juratoribus quæ damna prædictus Laurentius & alij ſuſtinuerunt ſingulatim occaſione prædicta. Qui dicunt quod prædictus Laurentius ſuſtinuit damna ad valentiam 10 l. Et Richardus Cohorta ad valentiam 10 l. & Johannes Gilman 5 l. & Johanna uxor dicti Johannis Gilman 5 l. & ſic ſingulatim de cæteris: Quæſitum eſt ſi prædicta Helena ſit ſufficiens ad aliqua damna ſolvenda. Qui dicunt, quod non. Quæſitum, quis vel qui abbettavit vel abbettaverunt præfatam Helenam ad appellationem prædictam proſequendam. Qui dicunt, quod Johannes Riddel ſenior, Johannes Riddel junior, Tho: Drury & Alicia Allet abbettaverunt præfatam Helenam, ideo ipſi diſtringuantur ſecundum formam ſtatuti ad reſpondendum, &c. Out of which Record theſe things are to be obſerved.

1. Although it is enacted by the Statute of Weſt. 2. cap. 21 That in this caſe Juſticiarij, &c. puniant appellatorem per priſonam unius Anni, &c. and according to the Court Committed to priſon, &c, ſo that they were not bayl able, yet Quia eadem Helena prægnans fuit & in periculo mortis; She was let out upon Main-priſe to have her body, 15. Mich. ad ſatisfaciendum prædicto Laurentio et alus de damnis ſingulatim adjudicatis occaſione prædicta: And the reaſon of this is, for this, that the Common Law requires in every caſe conveniency; and it is inconvenient that a woman with Child ſhould remain in common Goal Sub ſalva & arcta cuſtodia, where women cannot reſort to her upon times as neceſſity ſhall require forthwith for conveniency; and principally where it is for avoiding the danger of death, the Court hath power to put her Main-priſe untill ſhe be delivered, for it ought to be a truth concerning the Judges of the Common Law, which the Morall Poet hath ſpoken, Reddere perſonæ ſcit convenientia cuique: And with it agrees that advice which Bracton gives to the Judges, lib. 2. cap. 2.

Conſiderent Judices efficaciter quid oportuerit ſecundum neceſſitatem, quid expedierit ſecundum utilitatem, quid ligatum fuit ſecundum permiſſionem, & quid deceat ſecundum honeſtatem.

2. That the Defendants recover their damages either wholly againſt the Principal, or wholly againſt the Abettors, and not part againſt the one and part againſt the other; and that the Record is Quæſitum eſt, ſi prædicta Helena eſt ſufficiens ad aliqua damna ſolvenda: And with this tis agreed in 8 Ed: 4. 3.

3. Although that the Statute ſaith, Reſtituant Appellatores damna Appellatis, yet the damages ſhall be ſingulatim aſſeſſed; for that the words are further, Secundum diſcretionem Juſticiariorum, habito reſpectu ad priſonam vel areſtationem, &c. So that forasmuch as the cauſes of damages are ſeverall, as the defamation, &c. of the one may be greater than of the other, and the damages of the one may be greater than of the other.

4. That although that the Appellor be not ſufficient for to pay, yet his body ſhall be taken ad ſatisfaciendum. Quia qui non habet in ære, luet in Corpore.

5. That although that Jurors in the appeal have found the Defendants Abettors, yet inſomuch as they are ſtrangers to the Original', they ſhall not be concluded, for they ſhall be diſtrained ad reſpondendum: And to that they may plead not guilty, or other plea: Quia res inter alios actæ alteri nocere non debent.

Vide the Book of Entries, Title, Appeal, diviſione damages 1, & 2. And this doth appeare alſo by the ſaid Statute which ſayes, that Si Abertor convictus

convictus ſit de hujuſmodi Abettat. per malitiam puniatur per priſonam & tenetur ad reſtitutionem damnorum faciendam.

Placita coram Rege apud Ebor. in Craſtino Sancti Trin. An. 7 Ed. 3. 44. Diviſione Indictment are very worthy of obſervation; The effect of one Indictment was, Quod ubi quidem Robertus de Bayons de Tunelby captus fuit & in priſona Caſtri London detentus pro quodam debito ſtatuti mercatorij in Cuſtodia Thomæ Botelier Conſtabularij Caſtri de London ubi ipſe Thomas le Botelier poſuit ipſum Robertum in profundo Gaolo, inter Leones & vili priſona contra formam ſtatuti, &c. viz. de 1 Ed: 3. Et eodem profundo detinuit quouſque idem Robertus fecit finem cum eo de 40 s, quos ei ſolvit & hoc per exactionem.

Dureſs per Gaoler.

Item preſentant, That one Wellingoner was arreſted for Treſpaſſe at the Suit of James Cantelupe, and detained in the ſaid Goal, the ſaid Thomas for forty ſhillings, Ad largum ire permiſit: Idem Wallingoner ire non potuit quouſque finem fecit cum Roberto de Barton Clerico de dimidio Marcæ quod ei ſolvit & ulterius pro ferris.

Item preſentant, That one John Aylmer of Digby purchaſed of Thomas Lord of Bardolfe one Meſſuage, &c. Ibi venit Magiſter Clericus Eſchetoris colore officij ſui, & abſque aliqua cauſa dictam terram ſeiſinit in manus Domini Regis, et noluit ipſum Johannem permittere terram ſuam prædictam quouſque idem Johannes finem feciſſet cum prædicto Magiſtro Roberto pro 40 s, quos cepit per extortionem & nunc manum ſuam amovit.

Item preſentant, quod ubi Thomas Balivus Wapentachia de Flaxwell & Laughton, tenet Wapentachiam ſuam ſuper proclamationem, & illa proclamatio debet fieri ſolenniter in villa de Lasford & Kirkby, ſuper quam proclamationem homines VVapentachiæ poſſent pervenire ibi: Prædictus Tho: non fecit proclamationes ſuas, per quod homines patriæ amerciati ſunt graviter, & hujuſmodi amerciamenta de ijs levata fuerint & hoc, per extortionem: To which he appeared and pleaded not guilty, and was found guilty, and fined and impriſoned.

Item preſentant, quod Thomas de Maudon Balivus Wapentachiæ de Boby & Grafton, tenere debuiſſet 2. VVappentachia in diverſis locis ad aciamentum patriæ prout de Jure deberet, Idem Thomas tenebat ambo VVapentachia in uno loco, ad maximum damnum populi VVapentachiæ prædictæ, & homines eorundem VVapentachiorum nimis exceſſivè fuerint amerciati.

Item Thoms Carleton under Sheriff of the County of Lincoln, was indicted for this, that one Barthol: de Lotgrave purchaſed a Writ againſt Nicolas de Nottingham, and delivered the ſaid Writ to the ſaid Sheriff, who returnd a Tarde upon the ſaid Writ, although the ſaid Writ was ſufficently in time delivered: Et ſic fecit iterum, &c.

Item Hugo de Baxter Latro notorius indictatus de felonia non fuit replegiabilis & quod malæ famæ extitit,

IN an Action ſur le Caſe, it was reſolved per totam Curiam, that if a Sumner return one certified upon his Oath in Court Chriſtian, where in truth he was not, and he is pronounced Contumax, and after he is excommunicated, he ſhall have an Action ſur le Caſe, for here is Injuria & damnum. And in ſuch caſe the Plaintiff ſhall have Judgment to recover, for although that the proceeding and Oath touching this matter are Eccleſiaſticall, yet the dammage is temporall, for he is diſabled to ſue in any Court.

And it was reſolved, that Perjury, by which Damages doe accrue, may be puniſhed as a miſdemeanor at the ſuit of the King.

And alſo the party may have his Action upon the Caſe to recover Damages, for it ſhould be a very great defect in the Law, and encouragement to the parties, if men may commit Perjury with impunity: And for that reaſon, if Jurors uſe Perjury themſelves, an Attaint lyeth at the Common Law, for ſo it appears by Glanvil, lib: 2. cap: 29, 15 H: 8. title Attaint 75. 6 H. 3. ib. 73. & 75. and in the time of Ed: 1. Attaint 70. for the firſt Act which gave the attaint; the Statute of Weſt. 1 cap: 38. vid. F:N.B: 109. vid: 2. 7 H. 6. 25. one who was to be a pledge affirmed upon his Oath, that he could diſpend forty ſhillings per annum, und upon re-examination he confeſſed it falſe, for which he was committed to the Fleet untill he made a Fine, which proves that the falſe Oath was the wrong and injury, and puniſhable by the Law, Et ex conſequenti, when Damage follows to the party, he ſhall have remedy by Action upon the caſe.

In like manner it was agreed, that if one make a falſe Affidavit by which the party is arreſted and moleſted by proceſſe of contempt, he may have a action ſur le caſe, and recover damages. And although that when the matter is meer Eccleſiaſticall, the Court Chriſtian may punish Pro ſalute animæ, yet they cannot award any damages to the party, for if one within holy Order be beaten, they may proceed, againſt the Delinquent Pro ſalute animæ, but the Prieſt ought to recover his damages by action of Battery, So notwithſtanding that they may puniſh the ſaid Sumner in the caſe at the Bar, for Perjury and falſe certificate, yet the party grieved ſhall recover his Damages at the Common Law: And although the matter be meerly Eccleſiaſticall, yet if the party grieved hath damages, either by any wrongfull proceedings of the Judge, or Miſ-feaſans, or non-feaſans, or Falſity of any Miniſter, or by unjuſt proſecution of the party, the party grieved may have an action ſur le caſe, and recover his damages,

Doctor and Student 118, 119. Action ſur le caſe, lyeth againſt the Ordinary, for a wrongfull excommunication touching any thing out of his Juriſdiction, ſo there many other good caſes: And the caſe in Fitz: 47 H. 6. 8. If an Arch deacon refuſe to induct the Clerk, &c. he ſhall have an action upon the caſe, which was affirmed for good Law by all the Court, with which agrees 26 H: 8 3. a. and true it is, that it is held in 38 H: 6. 14. That in ſuch caſe he ſhall have remedy againſt the Arch-deacon to puniſh him; but ſaving the opinion there, they cannot award him damages in ſuch caſe, but he ſhall recover them at common Law: So F: N: B: 92. If a man prefered againſt a Prohibition, the party may have an Action upon the caſe againſt him for proſecuting in Court Chriſtian, vide Trin: 20 Ed: 3. Rot: 46, in the Treaſury: Richard Treſils Caſe, there he recovered Damages againſt the Biſhop of Norwich, by him excommunicated after Prohibition, Epiſcopus adjudicatur eſſe illicitum expugnatorem Authoritatis Regiæ, & querens recuperavit decem mille libras, ſimile Paſch: 13 Ed: 3, Rot: 78. Philip

de

de Hardeſhals caſe, Hil, 32 Ed. 3, Rot: 78. & 11 Tho: Seaton knight, recovered againſt Lucy who was the Wife of Robert Cockſide, for ſuing to Rome pro tranſgreſſione facta per ipſum Thomam, pro captione bonorum & catallorum ſuorum & pro debitis, & inde pronunciari fecit ſententiam excommunicationis, &c. he recovered by Verdict Damages to three thouſand pound, &c. Trin: 37 Ed: 1, Coſts were recovered againſt the Arch-biſhop of Canterbury, forty pound pro damnis, per quod ipſum excomunicavit pro executione brevis Regis pro manu fortia amovenda. Ideo Epiſcopus capt. Mich: 29 Ed: 3. Rot: 19. ſimiliter: And divers other Records you may ſee in my Book of Preſidents.

Paſch. 14 Jac.

A Habeas Corpus to the Marſhall of the Admiralty granted in Hill. Term laſt paſt, for Haukeridge, Priſoner in the cuſtody of the ſaid Marſhall, who did return, *Quædam cauſa ſpolij*, &c. contra Haukeridge pendet indeci pro judicio & ſententia paratus ſit, &c. *Qui* quidem Will: Haukeridge ſic commiſſus remanet donec ante dicta Cauſa per præfatum Daniel Dun fuerit, Et hoc eſt cauſa. And alſo upon another Habeas Corpus, he made ſuch a returne, and otherwiſe parata ſit &c. which the Court took to a very inſufficient, and gave divers daies to amend the return, and to ſhew the cauſe of delay, and for why ſentence was not given, forasmuch as ſententia fuit parata, or otherwiſe a man may be in perpetuall Priſon: And the Marſhall would not amend his return, upon which the party being in Priſon fifteen or eighteen weeks, alwaies the return was eſt parabeta &c. ſo the cauſe was long Parata ad judicium, ſed nunquam judicata: And after in another Writ returnable Craſtino Aſcentionis, was another return of Parata, &c. without ſhewing cauſe of delay: Alſo it ſeems the return was inſufficient for another cauſe, Viz. *Quædam cauſa ſpolij civilis & maritima quæ coram*, &c. which is too generall for too cauſes.

1. For that (ſpolij) is uncertain, and ought to be ſpecified in ſome more certainty of what things, or of, or in what things in particular, and does not ſhew any value of the Goods.

2. That Maritima eſt ſuper littus, or in portu maris, for thoſe appertain or are next to the Sea, and yet the Admirall hath not Juriſdiction Super littus maris or in portu, for that they are Infra corpus Comitatus, as appears in many Books and Records. And ſo it was adjudged in Lacie's caſe, that Infra the high water mark, and low water mark, when the Sea is at an Ebb, it is within the body of the County, Dyer, 15 Eliz. the Abbot of Ranſeyes caſe, yet this is Maritima, 15 Eliz: Dyer, fol: 326. Paſch: 17 Eliz. in Scaccario ac contra Diggs, for which cauſe he ought to have ſaid, Super altum mare, infra juriſdictionem Admiralli; for the Statutes of 13 R: 2. cap: 5. 2 H: 4. cap: 11 19 H: 6, 7. confine him only ſuper altum mare: And the Return which concerns the Impriſonment of the body ought to be certain.

But for the firſt, all the Court reſolved, that it was inſufficient: Alſo there was ſhewn no time of the ſpoyl; and for this, in the ſame Term, for the inſufficiency of the Return which the Court could not obtain to be amended; the ſaid Haukeridge was bailed in open Court untill the next

Term: Alſo the words are *Quædam cauſa ſpolii ac civilis ac maritima*, vid: 28.H:8. cap:15. that upon an inſufficient returne the party ought to be bailed or diſcharged, all our Books and infinite Preſidents are, vide 6 H.6. 44, otherwiſe if the Return ſhall be ſufficient when it is falſe. And note the proceeding was Civiliter, for to have reſtitution, & non Criminaliter.

Note, that it was ſaid by ſome, that when Judgment is given, that one ſhall be hanged untill he be dead; the King cannot alter the Judgment, and command that he ſhall be beheaded, for that the execution ought to be conform to the Judgment: and with this accords 35 H: 6. fol: 58, & Stamford lib: 1. fol:13.vide 27 Aſſ: pl: 41. vid: F: N: B: 144. where it ſeems that he may be beheaded, 22 Aſſ:pl: 49 One was beheaded for killing of Adam Walton, the Kings Meſſenger, which is there taken for petit Treaſon. But when one is attaint of Treaſon, his judgment is to be hanged by the neck, and cut down alive, and his Entrals and privy members cut off from his body, and burnt in his ſight, his head to be cut off, his body to be divided into four parts, and diſpoſed of at the Kings will, ſo that in ſuch caſe the King may pardon all the execution, but Decapitation, for this is parcell of the Judgment; and the King may pardon all or any part at his pleaſure; And it was reſolved that the Duke of Summerſet, foraſmuch as his Judgment was to be hanged by the neck could not be beheaded, for that would alter the Judgment. And ſo it was reſolved in the caſe of the Lord Sturton in the time of Queen Mary, and of the Lord Dacres in the time of H: 8, both which were hanged for Felony.

It was reſolved alſo, that King H: 8. could not by the Law behead his Wives for treaſon, for Judicandum eſt legibus, non exemplis.

And note, that when a Noble man is attaint of Treaſon, and hath this Judgment as is afore ſaid; the courſe is, that the King makes his Letters Patents directed to the Lord Chancellor of England, reciting the Attainder; yet we minding to diſpence with that manner of execution of Judgment, in reſpect that the ſaid A.B. is a Noble man, do therfore by theſe preſents remit and releaſe the ſaid A.B. of and from ſuch execution of Judgment, and in ſtead thereof, our pleaſure is, to have the head of the ſaid A.B. cut off, &c. as in ſuch caſes hath been uſed, touching or concerning Noble men: And by the ſame doe require the Lord Chancellor to make two Writs under the great Seal, one to the Lieutenant to deliver the ſaid Priſoner, and the other to the Sheriff of London, to receive and execute the ſaid Priſoner. &c. And the caſe of the Lord Sanchez was ſtronger, for that he was not Noble within England &c.

Trin. 9 Jac. Regis.

IN this very Term, I moved the Juſtices in Serjeants Inne in Fleetſtreet, upon the Statute An. 7 Jac: cap: 6. which gave power to two Juſtices of Peace, to require any perſon or perſons, &c. and in ſome caſes one Juſtice of Peace only, If the Juſtices of Peace may make a ſpeciall Warrant to Conſtables, &c. to have the bodies of parties, who are to take the Oath according to the Statute before them. And it was reſolved by all una voce, that they may, and that for two reaſons:

1. When the Statute gave power to Juſtices of peace to require any perſon or perſons, &c. to take the Oath, the Law implicre gave them power

er to make a Warrant to have the body before them, for Quando lex aliquid alicui concedit, conceditur & id sine quo res ipsa esse non potest.

2. It is against the Offices of the Justices, and of the authority given them by the Statute, that they shall go and seek the parties: And principally in a case of so great consequence. Then I moved, if in such case the Constables may break the houses of the parties named in their Warrants: And it seemed to us all that they cannot, for that they are not any Offenders untill they refuse to take the Oath before them who have authority to tender it to them or commit some contempt to the King; And insomuch as they are not yet Offenders, nor are indicted nor charged by any matter of Record, their houses cannot be broken by Warrant made by construction upon the Statute, by which authority is given, &c. to require them to take the Oath, vid. Statute 7 Jac. and see in it, that Baron and Baronesses, as to the tender of the Oath need not to be indicted, &c. for these words, Of or above the said age or degree, are to be intended of the said age, and above the said degree, or otherwise the first clause concerning Barons should be idle, vide those who have power to tender the Oath to them of the Nobility, have power to commit them upon refusall to the Common Goal, by the generall Act; and if any person or persons being of the age of eighten years, or above, shall refuse to take the said Oath duly tendred &c. which clause extends to all before.

Note, if the person be fugitive in another County, he evades the Statute for the present; but he may be indicted for recusancy, and the Indictment may be removed into the Kings Bench, and they may make processe against them in any County of England: Also if they are in their houses the dore being shut, &c. then they may be indicted either before the Justices of Assise, or before the Justices of Peace at the quarter Sessions, and then after a Venire facias, &c. by force of a Capias, their houses may be broken by the Sheriff, vide Statute 10 Eliz. Cap: 2. (to which the Statute of 23 Eliz: refers, &c.) such processe is given in case of not repairing to Church &c. as in Indictment of Trespasse which is Ven: fac: Cap: &c.

Memorandum Hil. Term 9 Jac: all the Justices of England by commandment of the King, signified by the Lord Chancellor, were assembled to have consideration of these two Statutes. And in the beginning of this Term, the said points were recited and debated, and after good consideration severally, and conference had altogether: It was resolved by all, That if one be indicted for Recusancy, the court may proceed by processe upon the Statute of 23 Eliz: or by proclamation according to the Statute of 28 Eliz And that the processe upon the Indictment, for Recusancy, and Ven: fac: Capias, &c. which is the processe in Indictment of Trespasse; and upon the Cap: the Sheriff upon request first made to open the Dore, according to the resolution in Seymans Case, and when the Sheriff brought him into Court, he may upon refusall of taking his Oath be generally indicted as before Justices of Assise, or in open Session of the Peace upon refusall before them: But the Justices upon the second day of conference, did not speake to the other point. And after this resolution was reported to the Lords of the privy Councill at Whitehall, in the presence of all the Justices of England, the seventh day of Feb: in Termin. sancti Hil: 9. Regis, and the Lord Chancellor desired that we should put our resolutions in writing; To which I answered, that the Judges never used to put their resolutions in writing, but that if the Attorney or Solicitor come to us (as the ancient use hath been to our Predecessors) we will deliver our opinions to them again Ore tenus, but not in writing.

At

At the third day of the conference in this very Term, it ſeemed upon the Statute 3 Jac: if Juſtices of Peace upon refuſall before them, commit any perſon to Gaol without Bail or Main-prize, and mention in their Warrant the tender and refuſall, then the Juſtices of Aſſiſes, or Juſtices of Peace ought to tender the Oath again, and to have a ſpeciall Indictment; for the words of the Act 3 Jac: are, And if the ſaid perſon or perſons, or any other whatſoever, &c. ſo that this word (other) excludes the perſons, who were committed for refuſall. But it ſeems if the Mittimus of the Juſtices of Peace &c. do not comprehend any tender and refuſall of the Oath, then they may be generally indicted, as upon refuſall in open Court, for the Court cannot take notice of tender and refuſall in ſuch caſe: And it was reſolved, that the major number of the Juſtices of Peace who commit the parties, have election to commit either to the next Aſſiſes, or the next Seſſions; for the words of the Statute being in the Diſjunctive, ſome may be more apt to be committed untill the next Aſſiſes, and ſome untill the next Seſſions: And it is to be obſerved, that two Juſtices, of which the one is to be of the Quorum, by the Statute 7 Jac: may commit any perſon above the age of eighteen, and under the degree of Nobility, although that he be not indicted, nor convict, &c. But a Juſtice of Peace cannot commit any unleſſe they be proſecuted, indicted, or convicted, &c. according to the Statute 7 Jac: And it was reſolved by all, That if the Indictment be commenced upon the Statute 3 Jac: upon refuſall in open Court, the Indictment may be ſhort and generall, of what the parties are indicted, &c. And not ſo if the Indictment be upon the Commitment made by two Juſtices of Peace; this is good of any perſon whatſoever, but in ſuch caſe if the Mittimus be eſpeciall, comprehending the tender of the Oath & refuſall, there ought to be a ſpeciall Indictment and refuſall in open Court. Alſo if the Juſtice of Peace make a ſpeciall Mittimus, then the Indictment ought to be ſpeciall, ſcil. To recite that the party was indicted or preſented, &c. in certain, according to the Statute of 7 Jac: And that he refuſed before one Juſtice of Peace, or otherwiſe in open Court; but if the Mittimus be generall, as is aforeſaid, then the Indictment before Juſtices of Aſſiſe at the Aſſiſes, or Juſtices of Peace at the Seſſions of Peace may be generall upon the Statute 3 Jac.

Mich. 10 Jac. Regis.

The Earl of Northamptons Caſe.

The Attorney-generall informed againſt Thomas Gooderick Gentleman, Sir Richard Cox Knight, Henry Vernon Gentleman, Henry Minors Serjeant of the Wagons, Thomas Lake Gent. and James Ingrum Merchant, Oretenus in the Star Chamber, the laſt day of the Star Chmber, and charged Gooderick that he had ſpoken and publiſhed of the Earl of Northampton, one of the Grandees and Peers of the Realm, one of the Kings privy Councill, Lord privy Seal, and Lord Guardian of the Cinque-ports, divers falſe and horrible Scandalls, ſcil. That more Jeſuites, Papiſts &c. have come into England, ſince the Earl of Northampton was Guardian of the Cinque-ports then before.

2. That the ſaid Earl had writ a Book openly againſt Garnet, &c, but ſecretly

ſecretly he had writ a Letter to Bellarmine, intimating that he writ the ſaid Book Ad placandum Regem, ſive ad faciendum populum, and requeſted that his Book might not be anſwered; and that the Arch-biſhop of Canterbury had certified it to the King, and that the ſaid Gooderick did relate it to one Dewsbury, a Batchelor in Divinity, who had acquainted the ſaid Earl with it. Gooderick being examined, confeſſed the words ſpoken; but to extenuate his offence ſaid, that he was not the firſt Founder: And he vouched the ſaid Sir Richard Cox, who confeſſed that he related to Gooderick the matter concerning the book of the Earl, and his letter to Bellarmine, but not the words concerning the Cinque-ports: And that the Arch-biſhop of Canterbury had informed the King of it, to the intent that the Earl of Northampton ſhould not be Lord Treaſurer; and to extenuate his Offence, he vouched the ſaid Vernon, who upon examination confeſſed that which Richard Cox had publiſhed, but that he was not the firſt Author, but he cited the ſaid Lake, who did likewiſe confeſſe what Vernon had ſaid, but that he heard it from Serjeant Nicols, who being examined confeſſed it. And with all, that one Speaker related it to him, and that he had heard it from one James Ingrum and James Ingrum being examined confeſſed the words concerning the ſaid Book of the Earl, and of the Letter to Bellarmine: And that in the month of October, he heard the ſaid words of two Engliſh Fugitives at Ligorne, and never did publiſh them untill the death of the Earl of Salisbury, Treaſurer, who dyed in May laſt: And all the ſaid Defendants confeſſed at the Bar, all that with which they were charged, And at the hearing of this Caſe were eleven Judges of Law, Fleming Juſtice being abſent Propter ægritudinem.

And ſo it was reſolved, that the publiſhing of falſe rumors, either concerning the King, or of the high Grandees of the Realm, was in ſome cauſes puniſhable by the Common Law: But of this were divers opinions.

1. Touching the matter and quality of the words.
2. Touching the perſons of whom they are ſpoke.
3. The manner of contrivance, or publiſhing of them.
4. Touching the puniſhment, for which cauſe divers Acts have made declaration, and have put things in certainty.

And firſt of all, as to the words or rumors themſelves.

1. They ought to be falſe and horrible.

2. Of which, diſcord or ſlander may ariſe betwixt the King and his people or the Grandees of the Realm, Weſt. 2. cap. 24. or between the Lords and Commons, 2 R. 2: cap: 53. by which great perill and miſchief may come to all the Realm, ibidem.

The ſubverſion and deſtruction of the Realm, ibidem. And for this the ſaid Act of 2. R: 2. againſt rumors, falſe and horrible Meſſages.

2. As to perſons, they are declared to be Prelates, Dukes, Earls, Barons, and other Nobles and Grandees of the Realm, and alſo of the Chancellor, Treaſurer, Clerk of the privy Seal, Steward of the houſhold of our Soveraign Lord the King, Juſtice of the one Bench, and of the other, or of any the great Officers of the Realm, ut 2 R: 2. cap: 5. and the King is contained within the Act of Weſt: 1: cap: 34. as appears in Dyer 5 Mar: 155.

3. As to the third point it was reſolved, that if one hear ſuch falſe and

horrible rumors either of the King, or of any of the said Grandees, it is not lawfull for him to relate to others, that he hath heard I: S: to say such false and horrible words; for if it should be lawfull, by this meanes they may be published generally, &c. And this doth appeare by the said Statute, viz. That the party shall be imprisoned untill hee find out the party who spoke them, which prowes that it was an offence, or otherwise he should not be punished for it by Fine (for this is implied) and Imprisonment.

It was also resolved, that the Offenders at the Bar, if against them the proceedings had been by Indictment upon these Statutes, no Judgment could be had against them that they should be imprisoned untill they found their Author: For, for example, Gooderick did not relate to Dewsbury that hee heard from Sir Richard Cox, but he related the same words as of himselfe: And for this no Judgement can be given against him, that hee shall be imprisoned untill he find his Author; for this, that he ought to be indicted for the words which he himselfe did speak, and then, De non apparentibus & non existentibus eadem est ratio, When the Indictment is generall without any relation to a certain Author, the Judgment, which alwaies ought to be given of matter apparant within the Record, cannot be that he shall be imprisoned, untill he hath found his Author.

And it was resolved, that if A. say to B. Did you not hear that C. is guilty of Treason, &c. this is tantamount to a scandalous publication: And in a private Action for slander of a common person, if I:S: publish that he hath heard I:N: say, that I:G: was a Traytor or Theef; in an Action of the Case, if the truth be such, he may justifie: But if I:S: publish,

That he hath heard generally without a certain Author, that I:G: was a Traytor or Theef, there an Action sur le case lyeth against I:S: for this, that he hath not given to the party agrieved any cause of Action against any, but against himselfe who published the words, although that in truth he might hear them, for otherwise this might tend to a great slander of an Innocent, for if one who hath Læsam Phantasiam, or who is a Drunkard, or of no estimation speak scandalous words, if it should be lawfull for a man of credit to report them generally, that he hath heard scandalous words, without mentioning of his author, that would give greater colour and probability that the words were true in respect of the credit of the Reporter, than if the Author himselfe should be mentioned, for the reputation and good name of every man, is dear and precious to him: And a Record was vouched in Mich. 33 & 34 Ed: and in the 30 Ass. pl: 10. and in the Exchequer Mich: 18 Ed: 1. Rot: 4.

Note, that all the Commissions of Oyer and Terminer give authority to enquire De illicitis verborum placitationibus, vide le Stat: 5 R: 2. cap: 6. & 17 R: 2. cap: 8. concerning Rumors, and in 3 Ed. 2. in the Exchequer, Henry Bray spoke of John Foxley Baron of the Exchequer: It was resolved, that the Judgment in an Indictment upon the said Statutes, when the words are spoken generally, without relation to a certain Author, is, that the Offender shall be fined and imprisoned, for this is implied and included in the said Statutes, as an incident to the offence, although that it is not expressed. Also the party grieved may have an Action de scandalo Magnatum, and recover his damages. Also the party grieved and the Kings Attorney, if the Offenders deny it, may exhibit a bill in the Star-Chamber against the Offender, in which the King shall have a Fine, and the party shall be imprisoned and the Court of Star-Chamber may inflict corporal punishment, as to stand upon the Pillory, and to have papers about his head.

And

And if the offenders confeſſe it, then to proceed. Ore tenus upon their own confeſſion; and for the publication of the ſaid words, all the Defendants were puniſhed by all the preſence, una voce nullo contradicente by Fines and Impriſonment; And Gooderick and Ingrum were fined the moſt, for that Goodrick had no author for the words concerning the Cinque Ports, nor could Ingrum find any Author for to vouch, that he heard by perſons unknown at Ligorne in forraign parts; and therfore it was taken as a fiction of his own.

Trin. 10 Jac.

Eſtwicks Caſe in Curia Wardorum.

KIng Philip and Queen Mary by their Letters Patents De gratia ſpeciali & ex certa ſcientia & mero motu, &c. granted to Aringal Wade in Fee, the Farm or Grange called Milton Grange in Com. Bedford, parcel of the poſſeſſions of the late diſſolved Monaſtery of Wooborne, Tenendum prædictam firmam ſive Grangium de nobis & ſucceſſioribus noſtris, ut de Manerio noſtro de Eaſt Greenwick in Com: Kantiæ in capite per ſervitium viceſimæ partis unius Feodi militis pro omnibus redditibus, ſervitijs, exactionibus, & demandis quibuſcunque, which Grange by mean conveyance, came to Chriſtopher Eaſtwick, after whoſe death the Tenure was found verbatim, according to the words of the Patent. And the queſtion was, if the Tenure was by a Mean, as of the ſaid Honour, or in Capite: And their principal reaſon was, that the Letters Patents of the King ſhall be conſtrued according to the Kings intention expreſſed in his Charter. And in this caſe of neceſſity ſome words ought to be rejected, ſcil. theſe words (in capite) and then the ſenſe will be, Tenendum de nobis &c. ut de Manerio noſtro de Eaſt Greenwick in Com. Kantiæ per ſervitium viceſimæ partis unius feodi militis, &c. or theſe words, De Mannerio noſtro de Eaſt Greenwick in Com. Kantiæ and then the ſenſe will bee, Tenendum de nobis, &c. in capite per viceſimam partem unius Feodi militis &c, for both together cannot ſtand; and then the better ſhall be taken for the King, as in 5 Mariæ, Dyer 162. Tenure of the King, Per ſervitium militare, is to be intended Tenure in Capite. So Tenure de quo vel quibus & per quæ ſervitia ignorant. is Tenure in Capite, for the beſt ſhall be taken for the King, 15 vide H: 7. 7. 14 Ed: 4. 5. & 3 H: 7. 12. 9 H. 7. 9. 6, per Huſſey 13 H: 7. 4 per Fineax, 19 H: 8. title Office Brook 58. action.

Another reaſon was added, that if theſe words, in Capite, ſhall be reſected, then the words enſuing, ſcil. per ſervitium viceſimæ partis unius Feodi militis, &c. ſhall be rejected here; and then the Tenure will be by one entire Fee of a Knight, for words in the middle of a Sentence may be extracted: And as well the conſequent as the precedent ſtand: But it was anſwered and reſolved, that the ſaid Grange was held of the King as of the Honour, and not in Capite, And the reaſon was for this, that Tenure of the King in Capite is as much as to ſay, Tenure in Groſſe, or of the perſon of the King: And for this, that the chief and principall part of the body of the Tenure of the perſon of the King is ſaid in Capite. And it appears by ancient Records, that in ancient time all Tenures in Groſſe, or

of

of the perſon of a Subject called Tenures in Capite: as in Clauſe: 9 H: 3. member 28. Robertus filius Madock tenuit terram de Thoma Corbet in Capite: And in the ſame manner you ſhall find by many other Records, Lands to be held of Subjects in Capite, which we call Tenure of the perſon or in Groſſe, but of late time Dicitur de Rege ſolummodo, terras teneri in Capite. Then it is as much as to ſay, Tenendum de nobis, &c. ut de Manerio noſtro de Eaſt Greenwich in Groſſe, ut de perſona noſtra, which is againſt the nature of a Tenure in Groſſe, or of the perſon when the Land is expreſly limitted to be holden of a Mannor, &c. And for this, if the ſaid words ſhould be tranſported, ſcil, Tenendum de nobis in Capite ut de Manerio noſtro de Eaſt Greenwich. &c. this will not alter the Caſe, for when in the beginning or end, the Law is expreſly limitted to be held Ut de Manerio, the Tenure of the perſon is abundant, or it may have this ſenſe, that the King is Caput totius Regni: And for this, inaſmuch as it is limited to hold of the King, who is chief, it may be vulgarly ſaid, that the Tenure is in cheif, inaſmuch as it is of the King as of a Mannor.

And as to the ſecond Objection; it was reſolved, That the abundant words ſhall be extended in Conſtruction of the Law, and not the words ſubſequent, which doth limit the Term in certainty: And with this reſolution in the principall point agrees Mich: 17, & 18 Eliz. 345. where it was found that Owen ap David was ſeiſed of certain Land in Fee held of the Queen, as of the Principality of Wales in Cap: And it was held, Per concilium Curiæ, no Tenure in Capite; and ſo (as it was ſaid) it was reſolved in the time of H: 8: in Baron Lukes Caſe, where Lands were granted by the King to hold of him as of the Honour of Huntington, in Capite, that this was a mean Tenure, and not in Capite.

Nota. That a Tenure of any ancient Honours, as of Rawleigh, Hagent, and Peverell, are by uſage, and allowance in all ages taken for to have the effect of a Tenure in Capite, ſcil. To have all the Lands in Guard, &c. Et non valet ratio contra experimentum, vide le Stat. de Magna Charta, cap: 31, and the 11 H: 7. in Rot: Parliamenri not Printed, and 1 H: 6, cap: 4 vide Bracton. lib: 2. fol: 87. 30 H: 8. Dyer 8. 58. 29 H: 8. Brook, title Livery 28. 57. 5 Ed: 3. 5.

THE

A TABLE OF THE PRINCIPALL MATTERS Contained in this BOOK.

Habeas

Recuſancy

FINIS